115

FILED
JAN 4 1956
HAROLD B. WILLEY, C

No. 604

In the Supreme Court of the United States

REYNOLDS METALS COMPANY,

Petitioner,

vs.

MULTNOMAH COUNTY, TERRY D. SCHRUNK, as Sheriff and Tax Collector of Multnomah County, WILEY W. SMITH, as Assessor of Multnomah County, and SI COHN, as County Clerk of Multnomah County,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

C. ALLAN HART, JR.,
730 American Bank Building,
Portland 5, Oregon,
Counsel for Petitioner.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 11-55

INDEX

Page

Petition for Writ of Certiorari to the Supreme Court of Oregon 1
A The Opinions Below 2
B Jurisdiction of this Court to Review 2
C The Question Presented for Review 3
D The Constitutional Provisions Involved 3
E Statement of the Case 4
F How the Federal Question was Raised 8
G Reasons for Granting the Writ 9
1. The Constitutional Issue has Substantial Public Importance 9
2. The Conflict with the Parr-Richmond Case is Direct and Inescapable 11
3. The Construction of the Letter of Intent Presents a Federal Question, to be Decided under Federal Law 16
4. The Lower Court's Decision is Erroneous 16

Conclusion 20

Appendix A
Letter of Intent 21
First Supplementary Letter 37
Second Supplementary Letter 38
Third Supplementary Letter 40

Appendix B
Circuit Court's Memorandum Opinion 42
Circuit Court's Supplementary Opinion 53

Appendix C
Oregon Supreme Court's Opinion 57

Appendix D
California Supreme Court's Opinion in *Parr-Richmond Industrial Corporation vs. S. S. Boyd* 74

Appendix E
Decree and Judgment Order of Circuit Court 91
Decree of Oregon Supreme Court 92

CASES

Page

Eisley v. Mohan, 31 Cal. 2d 637, 192 P. 2d 5 (1948) ... 11

Edward Hines Lumber Co. v. Lane County, 196 Or. 420, 248 P. 2d 720 (1952) ... 9

Land O'Lakes Dairy Co. v. Sebeka, 225 Minn. 540, 31 N.W. 2d 660 (1948), certiorari denied 334 U.S. 844, 68 S. Ct. 1513, 92 L. Ed. 1768 (1948), same case, 229 Minn. 263, 39 N.W. 2d 164 (1949), affirmed without opinion, 338 U.S. 897, 70 S. Ct. 251, 94 L. Ed. 552 (1949), rehearing denied, 338 U.S. 945, 70 S. Ct. 428, 94 L. Ed. 583 (1950) ... 10

Lederman v. Bodovitz, 198 Okl. 276, 177 P. 2d 1002 (1947) ... 9

Newark v. Fischer, 8 N.J. 191, 84 A. 2d 547 (1951) ... 11

Norbet Corporation v. Newark, 135 N.J.L. 314, 51 A. 2d 541 (1947), affirmed without opinion, 137 N.J.L. 301, 59 A. 2d 624 (1948) ... 11

Parr-Richmond Industrial Corporation v. Boyd, 262 P. 2d 573 (Cal. Ap. 1953) ... 7

Parr-Richmond Industrial Corporation v. Boyd, 43 Cal. 2d 157, 272 P. 2d 16 (1954) (reprinted herein as Appendix D, infra, page 74) ... 3, 8, 11, 15, 17, 19

Skate Creek Logging Co. v. Fletcher, 146 Wash. Adv. Sheets 147, 278 P. 2d 1009 (1955) ... 9

S. R. A., Inc., v. Minnesota, 327 U.S. 558, 66 S. Ct. 749, 90 L. Ed. 851 (1946) ... 3, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18

United States v. Allegheny County, 322 U.S. 174, 64 S. Ct. 908, 88 L. Ed. 1209 (1944) ... 16

United States v. Minnesota, 113 F. Supp. 488 (D. Minn. 1953) ... 9

Van Brocklin v. Tennessee, 117 U.S. 151, 6 S. Ct. 670, 29 L. Ed. 845 (1886) ... 4

STATUTES

	Page
62 Stat. 929, 28 U.S.C. Section 1257 (3)	2
50 U.S.C., Section 452	6
U. S. Constitution, Article I, Section 8	3, 4
U. S. Constitution, Article IV, Section 3	4
U. S. Constitution, Article VI	4

TEXT BOOKS

Contracts Restatement, Section 250	12
Corbin on Contracts, Section 628	12
Pomeroy, Specific Performance, Section 319	18
Williston on Contracts (Rev. Ed.), Section 667A	13
Williston on Sales (Rev. Ed.), Section 262	18

In the Supreme Court
of the United States

REYNOLDS METALS COMPANY,

Petitioner,

vs.

MULTNOMAH COUNTY, TERRY D. SCHRUNK, as Sheriff and Tax Collector of Multnomah County, WILEY W. SMITH, as Assessor of Multnomah County, and SI COHN, as County Clerk of Multnomah County,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Reynolds Metals Company respectfully prays that a Writ of Certiorari issue to review the decree of the Supreme Court of Oregon in the above entitled case.*

*(*Note as to the title of this case:* This case was originally filed by Reynolds Aluminum Company, then a wholly owned subsidiary of petitioner. This was because the personal property here sought to be taxed was assessed in the name of Reynolds Aluminum Company, as the corporation that contracted with the United States to purchase such property. While this case was pending before the Supreme Court of Oregon, Reynolds Aluminum Com-

In support of the above petition, petitioner respectfully shows the Court as follows:

A. THE OPINIONS BELOW.

The memorandum opinions of the Circuit Court of the State of Oregon for the County of Multnomah are unreported, and are printed in Appendix B, infra, pages 42, 53.

The opinion of the Supreme Court of Oregon is reported at 61 Or. Advance Sheets 155, 287 P. (2d) 921, and is printed in Appendix C, infra, page 57.

B. JURISDICTION OF THIS COURT TO REVIEW.

The grounds on which the jurisdiction of this Court is invoked are, first, that the contract here involved is a federal contract, the interpretation of which presents a federal question; and second, that the Oregon tax which was upheld in the lower court is an unconstitutional exaction, in that it was assessed upon property of the United States, in violation of various provisions (hereinafter cited) of the Constitution of the United States.

The decree of the Oregon Supreme Court was dated and entered on September 21, 1955. The Oregon Supreme Court denied petitioner's petition for rehearing in this case on October 12, 1955. See Appendix E, infra, page 92. The statutory provision which confers jurisdiction on this Court to review the above decree is 62 Stat. 929, 28 U.S.C. Section 1257(3).

---

pany was merged into petitioner. On October 12, 1955, the Supreme Court of Oregon made and entered an order substituting petitioner for Reynolds Aluminum Company as the plaintiff appellant in said case. R. 113.)

C. THE QUESTION PRESENTED FOR REVIEW.

This Court in *S.R.A., Inc. v. Minnesota,* 327 U.S. 558, 66 S. Ct. 749, 90 L. Ed. 851 (1946), upheld state taxation of government property being sold by the United States under what the Court described as "a normal executory contract for the sale of land with partial payments." The question here presented for review is as to whether under the *SRA* case rule the State of Oregon can constitutionally levy a personal property tax on government property as soon as the United States enters into a *conditional* contract for its sale, preliminary to conveying it and taking a purchase money mortgage back; the Oregon Supreme Court having upheld such taxation by misconstruing the particular agreement as absolute rather than conditional.

The Oregon Supreme Court's decision on the above constitutional question is in conflict with the decision of the California Supreme Court in *Parr-Richmond Industrial Corporation v. Boyd,* 43 Cal. 2d 157, 272 P. (2d) 16 (1954). The opinion of the California Supreme Court is printed in Appendix D, infra, page 74.

D. THE CONSTITUTIONAL PROVISIONS INVOLVED.

No specific provisions of the Constitution of the United States can be pointed to as establishing the constitutional exemption of federal property from state taxation. This Court has held, however, that such exemption results by implication from Clauses 1 and 17 of Section 8, Article I:

Section 8. The Congress shall have power

> 1. To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; . . .
>
> . . .
>
> 17. To exercise exclusive legislation . . . over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; . . .

from Clause 2 of Section 3, Article IV:

> 2. The Congress shall have power to dispose of and make all needful rules and regulations resepecting the territory or other property belonging to the United States; . . .

and from Clause 2 of Article VI:

> 2. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

See *Van Brocklin v. Tennessee*, 117 U.S. 151, 159, 6 S. Ct. 670, 675, 29 L. Ed. 845, 848 (1886).

E. STATEMENT OF THE CASE.

There are no disputed facts in this litigation. The case was presented to the trial court on the pleadings and a stipulation, without a trial. The following facts were alleged in the Complaint (R. 52) and admitted

in the Answer (R. 29), and were confirmed by the trial court's findings (R. 9).

On December 21, 1949, the United States as the seller entered into an agreement with Reynolds Aluminum Company as the purchaser, providing for the sale to the Company of four war-time aluminum plants. One of these was in Oregon, being the so-called Troutdale Aluminum Plant, in Multnomah County, Oregon. Several years prior to this, petitioner had leased all four of these plants from the Government, and throughout this purchase transaction the petitioner was in possession of said plants as the lessee thereof, and was carrying on manufacturing operations therein.

The above purchase agreement, which was called a "Letter of Intent", provided for a total consideration of $50,081,958, to be paid by a down payment of about 5% of the purchase price, and by stated annual installments over a twenty-five year period, Par. (1); it being agreed that title to the plants would be conveyed to the Company by deeds, and that the Company would simultaneously execute purchase money mortgages thereon to secure the unpaid balance of the purchase price, Par. (4). The Letter of Intent expressly provided further that the Company's agreement to purchase the plants was subject to two conditions: first, if within 90 days after receipt of the Government's title evidence the Government's titles were found to contain defects, and if these were not cured within 60 days thereafter, Par. (9), and second, if within 120 days the Company was unable to obtain the Defense Department's approval of

a "National Security Clause"* satisfactory to the Company, Par. (6), then in either such case the Company could "rescind" the agreement, in which event the petitioner's pre-existing leases of the plants would be revived "as of the time of their termination", and all sums theretofore paid on the purchase price would be credited against the rentals due under such leases, Par. (19).

The foregoing is not a full summary or description of the Letter of Intent, but is adequate to indicate the structure of the purchase transaction for which it provided. For the convenience of the Court the full text of the Letter of Intent, and of three letters supplementary thereto, is printed as Appendix A, *infra,* page 21. Comment on other provisions of the Letter of Intent will be deferred until later in this presentation.

On January 1, 1950, being eleven days after the execution of the Letter of Intent, the Company had not yet received title reports showing marketable titles as to any of the four plants, nor had it yet obtained approal of a satisfactory National Security Clause. The Government's title to the Troutdale plant was determined to be marketable on April 21, 1950; and on May 4, 1950 the Company was informed that a proposed National Security Clause that was acceptable to the Company had been approved by the Munitions Board. Therefore on June 29, 1950, the Government executed a

---

*50 U.S.C. Section 452 defines these clauses, and *requires* them to be included in contracts such as the Letter of Intent, for the government's protection.

deed and bill of sale covering the Troutdale plant, and delivered it to the Company; and the Company simultaneously executed and delivered to the Government a purchase money mortgage on the plant.

The 1950 personal property tax here in issue was levied on the Troutdale plant's machinery and equipment (which was tax exempt until it passed into private ownership in this transaction) as of January 1, 1950, on the theory that the execution of the Letter of Intent (and the paying of the down payment) eleven days earlier was effective to transfer the taxable ownership of the plant to the Company.

The amount of the tax as so levied is $199,144.00, and it carries interest at the rate of 8% per annum from November 8, 1951.

Petitioner brought suit in the Oregon Circuit Court, to enjoin the enforcement and collection of this tax. The trial court upheld the taxability of the property on the ground that the above title and National Security Clause conditions in the Letter of Intent were not sufficient to distinguish the Letter of Intent from a "normal executory contract for the sale of land" within the meaning of the rule of constitutional law established by this Court in *S.R.A., Inc. v. Minnesota*, supra. See Appendix B, *infra*, at page 55. On the basis of these opinions, a decree was entered dismissing petitioner's Complaint (R. 7). This decree is printed in Appendix E, *infra*, page 91.

After the trial court's above decision, the decision of the California District Court of Appeals in *Parr-*

Richmond Industrial Corporation v. Boyd, 262 P. 2d 573 (1953), became available, and thereafter this decision was affirmed by the California Supreme Court, 43 Cal. 2d 157, 272 P. 2d 16 (1954). See Appendix D, *infra,* page 74. In the instant case the California Supreme Court's decision in the *Parr-Richmond* case was discussed at length in the briefs filed by both sides with the Oregon Supreme Court.

However the Supreme Court of Oregon affirmed the decree of the Circuit Court in this case. The court held that the Letter of Intent was an executory contract of sale within the rule of the *SRA* case, and that the Troutdale machinery and equipment was therefore constitutionally taxable on January 1, 1950. The Oregon court avoided an appearance of conflict with the *Parr-Richmond* case, which it did not even mention or cite, by holding that the title condition and National Security clause condition in the Letter of Intent were mere conditions subsequent, and so "in no way affected the status of the parties." See Appendix C, *infra,* at page 68. The Supreme Court's decree is printed in Appendix E, *infra,* page 92.

F. HOW THE FEDERAL QUESTION WAS RAISED.

Petitioner's contention that on January 1, 1950 the Troutdale machinery and equipment still belonged to the United States and so was constitutionally exempt from state taxation was advanced in Paragraphs XI, XIII and XVIII of petitioner's Complaint in this case, (R. 58, 59), and was renewed in the "First Assignment of Error" in petitioner's brief in the Oregon Supreme Court (this Assignment of Error being quoted in the Oregon

Supreme Court's opinion). The above paragraphs of petitioner's Complaint and the above Assignment of Error are not set forth here, because both the trial court and the Oregon Supreme Court recognized that the central issue in this case was the taxability of the property under the Federal Constitution as construed in the *SRA* case, and both courts considered and disposed of this issue.

G. REASONS FOR GRANTING THE WRIT.

1. The Constitutional Issue Has Substantial Public Importance.

Whenever the United States sells government property under a contract providing for payment of the purchase price by installments and for a deferred conveyance of title, the question arises as to the point in the transaction at which the property being sold becomes taxable under the rule of constitutional law established by this Court in *S.R.A., Inc. v. Minnesota,* supra.

This question usually arises after the government and the purchaser have executed a formal and final contract of purchase and sale; and even then it is difficult enough. Compare *Edward Hines Lumber Co. v. Lane County,* 196 Or. 420, 248 P. 2d 720 (1952), with *Skate Creek Logging Co. v. Fletcher,* 146 Wash. Adv. Sheets 147, 278 P. 2d 1009 (1955), both involving the application of the *SRA* case to sales of National Forest timber. And compare the majority, concurring and dissenting opinions in *Lederman v. Bodovitz,* 198 Okl. 276, 177 P. 2d 1002 (1947), involving a sale of Indian land. And finally, compare *United States v. Minnesota,* 113

F. Supp. 488 (D. Minn. 1953), holding invalid under the *SRA* case the very same tax that was previously upheld on the authority of the *SRA* case in *Land O'Lakes Dairy Co. v. Sebeka*, 225 Minn. 540, 31 N.W. 2d 660 (1948), cert. denied 334 U.S. 844, 68 S. Ct. 1513, 92 L. Ed. 1768 (1948), same case, 229 Minn. 263, 39 N.W. 2d 164 (1949), affirmed without opinion, 338 U.S. 897, 70 S. Ct. 251, 94 L. Ed. 552 (1949), rehearing denied, 338 U.S. 945, 70 S. Ct. 428, 94 L. Ed. 583 (1950).

But the question here is as to taxability under the *SRA* case before the execution of the final contract documents, by which the sale is to be consummated, and in fact before it is certain and definite that the purchaser will purchase the property.

Whatever the character of the government property being offered for sale, and whether the sale is on competitive bids or is negotiated, the decision of the Oregon Supreme Court in the instant case, if allowed to stand, will justify state taxation of the property in the purchaser's name as soon as the bargain is struck and an earnest-money type of preliminary agreement is entered into. Under this decision those buying government property will be well advised to withhold even a conditional purchase commitment until title questions and all other uncertainties have been resolved and the purchaser is accordingly ready to take over full ownership of the property.

It can hardly be doubted that the result will be to hamper and impede the efforts of the government to make advantageous sales of its properties.

The fact that the question as to the taxability of government property in these circumstances reached the California Supreme Court in the *Parr-Richmond* case in June, 1954, and was decided in one way, and reached the Oregon Supreme Court in the instant case in September, 1955, and was decided in the opposite way, shows that the issue is recurring, difficult and of public importance.

We submit that a clarification of the *SRA* case rule on this issue is important both for federal officials and for purchasers of government property on the one hand, and for state and county officials concerned with ad valorem taxation on the other hand, as well as for the state and lower federal courts in passing on the opposing contentions of these groups.*

2. The Conflict with the Parr-Richmond Case Is Direct and Inescapable.

The Oregon Supreme Court's construction of the Letter of Intent as an unconditional executory contract of sale, rather than as a merely conditional contract, avoided the appearance of a conflict with the *Parr-Richmond* case.

The principal basis for the Oregon court's conclusion was its holding that the title provisions and the National

---

*Also to be noted is the fact that the *SRA* case rule is frequently followed and applied in cases involving sales by the states and their subdivisions. See for example *Eisley v. Mohan*, 31 Cal. 2d 637, 192 P. 2d 5 (1948); *Norbet Corporation v. Newark*, 135 N.J.L. 314, 51 A. 2d 541 (1947), affirmed without opinion, 137 N.J.L. 301, 59 A. 2d 624 (1948); *Newark v. Fischer*, 8 N.J. 191, 84 A. 2d 547 (1951).

Security Clause provision in the Letter of Intent were conditions subsequent rather than conditions precedent, and that therefore these provisions "in no way affected the legal status of the parties at the time the contract was executed". This is patently erroneous.

Petitioner contended in the lower courts and will contend in this Court that the title and National Security Clause provisions were true conditions precedent, although expressed as conditions subsequent (i.e., as affording a right to rescind).

The confusion between conditions precedent and conditions subsequent "is both ancient and respectable". 3 Corbin on Contracts, Section 628 (see page 514, N.).

Under Paragraphs (8), (9) and (19) of the Letter of Intent, the Government was obligated to make its title evidence available to the Company, and the Company was then entitled to 90 days within which to make its title examination. Similarly underParagraphs (6) and (19), the Company was entitled to 120 days within which to obtain approval of a National Security Clause satisfactory to it. The effect of these provisions was that the 90 day title period had to elapse without a defect being found in the government's titles, and the 120 day National Security Clause period had to elapse, and the requisite approval had to be obtained, before the government would have a right to immediate performance by the Company. Thus both provisions were true conditions precedent, within the accepted definition. See Contracts Restatement, Section 250.

The fact that these provisions were expressed as conditions subsequent is of little consequence.

> "What are generally called conditions subsequent in contracts are so called with little propriety. They are in substance conditions precedent to a duty of immediate performance, and are subsequent only in form." 3 Williston on Contracts (Rev. Ed.), Section 667A.

But even if these provisions were conditions subsequent, it does not follow that they "in no way affected the legal status of the parties."

When a contractual promise is subject to a true condition subsequent, that is, when a stated fact or occurrence will relieve a promisor from his contractual duty, those things which the promisor must do *before* the condition is fulfilled are not affected by it, but those things which the promisor need not do until *after* the condition is fulfilled, and which he will then be excused from doing if the stated contingency occurs, are directly affected by the condition. The latter duties are just as conditional as those which are subject to a condition precedent.

Under the Letter of Intent, the Company was under no duty to proceed with its purchase of the plants until *after* either a finding of clear titles or the expiration of the 90 day title period, and until *after* the requisite approval had been obtained within the 120 day National Security Clause period. Therefore even if these provisions were conditions subsequent, the Company's purchase obligation remained conditional until they were satisfied.

No court would have granted the government specific performance on January 1, 1950, or at any time before the Company had had an opportunity to examine the Govenment's titles and to obtain approval of a satisfactory National Security Clause, because to do so might have resulted in compelling the Company to take defective titles or an unacceptable National Security Clause.

The Oregon Supreme Court does not explain what would have happened, on its premise of taxability on January 1, 1950, if subsequently there was a failure of the title condition or of the National Security Clause condition, and if the Company accordingly rescinded. Only two answers are available: either the supposed taxability would vanish retroactively (to the confusion of the tax collector) when the rescission occurred, or the Company would be compelled to pay taxes on property which it considered purchasing but did not purchase. Neither answer seems satisfactory.

The Oregon Supreme Court's error in construing these two provisions as not constituting conditions that affected the Company's purchase obligation is so apparent that it should not be permitted to obscure the true meaning and effect of the court's holding. In substance, the holding of the Oregon court was that the execution of the Letter of Intent transferred a taxable ownership to the Company under the *SRA* case, *even though the Company's purchase obligation was to remain conditional until the title and National Security Clause conditions were satisfied.*

Thus the decision in this case is in direct conflict with the *Parr-Richmond* case, where the California Supreme Court held that government property which the United States has contracted to sell is *not* taxable under the *SRA* case so long as the vendee's purchase obligation remains conditional. See Appendix D, *infra,* at pages 87-88.

Some attempt was made in the court below to distinguish the *Parr-Richmond* case because in that case there was a known defect in the government's title on the tax date, whereas in this case all that appears is that on January 1, 1950 the status of the government's titles had not yet been investigated, and that on April 21, 1950 the Troutdale title was found to be clear. But this merely means that in the *Parr-Richmond* case the title condition could only be satisfied by clearing the known defect, whereas in this case the title condition, judged as of January 1, 1950, could have been satisfied either by finding the title to be clear or by clearing any defects found to exist. In any event the supposed distinction does not even purport to affect the National Security Clause condition in the Letter of Intent.

In the *Parr-Richmond* case the crucial fact was that the contract was not specifically enforceable on the tax date. Similarly in this case *the Letter of Intent was not specifically enforceable on January 1, 1950.*

Therefore the conflict between the decision in the court below and the *Parr-Richmond* case is as inescapable as it is direct.

3. The Construction of the Letter of Intent Presents a Federal Question, to be Decided under Federal Law.

When a state seeks to tax government property which is the subject of a contract between the United States and a private corporation or person, the question as to whether the contract transfers a taxable ownership to the private contractor is governed by federal law rather than by state law, and is peculiarly within the cognizance of this Court. In speaking of this precise issue in *United States v. Allegheny County*, 322 U.S. 174, 183, 64 S. Ct. 908, 913, 88 L. Ed. 1209, 1217 (1944), this Court said:

> *". . . The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state."* (Italics supplied.)

It follows that this Court is in no sense bound to accept the Oregon Supreme Court's interpretation of the Letter of Intent.

4. The Lower Court's Decision Is Erroneous.

This Court in the *SRA* case clearly did not contemplate that government property being sold on contract was to be taxable before the vendee had undertaken an absolute and unconditional purchase obligation. According to the *SRA* case, taxability follows when the real beneficial ownership passes to the vendee. But no vendor, and least of all the United States, would intend

to transfer the real beneficial ownership until the vendee is ready to and does make an absolute and immediately enforceable commitment to purchase.

Throughout its opinion in the *SRA* case this Court referred to the mortgage analogy. The essence of the Court's holding was that where the United States is the vendor under an executory contract of sale, "in substance it is in the position of a mortgagee". (327 U.S. at 565). The Court said that when the beneficial interest has passed to the vendee under such a contract, the government's

> "retention of legal title does not give a significant difference from the situation of a deed with a lien retained or a mortgage back to secure the purchase money." (327 U.S. at 569).

Since a mortgage presupposes an absolute payment obligation, the above language confirms that the *SRA* case rule is premised upon the existence of an unconditional purchase commitment by the vendee.

The Letter of Intent in this case was *not* a security instrument of any kind, and least of all was it equivalent to a purchase money mortgage. Instead it was an agreement to enter into a security arrangement, to-wit: a purchase money mortgage relationship, at a later time. *The purpose of the Letter of Intent was not to afford the government security in the formal sense, but to provide a "holding" agreement until the title and National Security Clause problems were resolved and the parties were ready to enter into a formal security relationship.*

This is confirmed by Paragraph (7) of the Letter of Intent, which expressly provided that the *entire* unpaid

balance of the purchase price, to wit: $47,500,000, was to be secured by the purchase money mortgages. It is clear from this that the mortgages were to be executed and delivered, superseding the Letter of Intent—that is, the closing was to occur—before July 1, 1950, when the Company's first annual installment payment was to be made. Thus there was no intention that the Company would make its installment payments under the Letter of Intent, or that the Letter of Intent would otherwise govern the transaction for anything more than a brief period.

The California Supreme Court in the *Parr-Richmond* case characterized the "Letter of Intent" involved in that case as a similar holding agreement, that is, as "an arrangement covering the interval for clearing a good and merchantable title", as distinguished from "the normal vendor-vendee contract" involved in the *SRA* case. See Appendix D, *infra*, at page 87.

The California court also noted that under ordinary equity principles, equitable conversion does not occur until a contract is changed from a conditional into an absolute one. See Pomeroy, Specific Performance, Section 319.

In the instant case the Oregon Supreme Court, not having recognized that the title and National Security Clause provisions made the Letter of Intent a conditional agreement, mentioned several points which it thought tended to show that the Letter of Intent was an executory contract of sale. These may be commented upon briefly as follows:

The use in the Letter of Intent of the language of a present sale—the "Seller hereby sells" and the "Purchaser hereby buys"—rather than of an agreement to sell and buy, is not unusual nor of great significance, 2 Williston on Sales (Rev. Ed.), Section 262. Note that in the Letter of Intent there are references both to "this sales *agreement*" (E.g., see Paragraphs (6) and (19)) and to "this sale" (E.g., see Paragraphs (10) and (11)).

The Oregon court noted that the Letter of Intent provided "minute details for the final closing of the transaction." But such details must be included if a "holding agreement" of this sort is to qualify even as a conditional contract; because if essential terms are omitted, no contract of any kind results.

The fact that under the Letter of Intent there was an immediate assumption by the Company of all risk of loss or damage to the property, Paragraph (12), loses its significance in the light of Paragraph (19), under which, if the Company rescinded because of a failure of the title condition or of the National Security Clause condition, petitioner's prior leases of the plants would be revived "as of the time of their termination", and "as if this sales agreement had never been executed." The effect of this was that the Company's assumption of risk was only conditional: if the Company rescinded, any intervening loss theretofore assumed by it would be transferred back to the Government.

Similarly the fact that (as held by the court below) the Company was in actual and exclusive possession and control of the plant has little significance, because petitioner was already in actual possession as lessee, and

because any possessory right under the Letter of Intent was clearly subject to the Company's right to terminate for failure of either of the two conditions. In the *Parr-Richmond* case there was a similar transfer of possession while the contract remained conditional, and although the vendee in that case was a stranger to the property, the California court held that the transfer of possession was not legally significant, but was merely "a gratuitous and revocable right to possession."

Finally, the court below referred to the provision in the Letter of Intent purporting to make the purchase retroactively effective "as of July 1, 1949", and the Court noted but did not pass on a contention that under this provision the subsequent transfer of legal title related back to July 1, 1949. The real purpose and effect of this provision was indirectly to reduce the total purchase price by applying thereon the rentals paid by petitioner under the prior lease for the period between July 1, 1949 and December 21, 1949.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

C. ALLAN HART, JR.,
730 American Bank Building,
Portland 5, Oregon,
Counsel for Petitioner.

December 30, 1955.

APPENDIX A

GENERAL SERVICES ADMINISTRATION

DEC 15 1949

Reynolds Aluminum Company 25000
Reynolds Metals Building
Third and Grace Streets
Richmond 19, Virginia

Attention: Mr. Richard S. Reynolds, Jr., President

Re: Plancor 226-X, Hurricane Creek, Arkansas;
Plancor 226-K, Jones Mills, Arkansas;
Plancor 226-O, Troutdale, Oregon;
Plancor 652, McCook, Illinois.

Gentlemen:

General Services Administration (hereinafter referred to as Seller) hereby sells to Reynolds Aluminum Company (hereinafter referred to as Purchaser), a wholly owned subsidiary of Reynolds Metals Company, and Purchaser hereby buys the Hurricane Creek, Arkansas, Alumina Plant known as Plancor 226-X; the Jones Mills, Arkansas, Aluminum Reduction Plant known as Plancor 226-K; the Troutdale, Oregon, Aluminum Reduction Plant known as Plancor 226-O; and the McCook, Illinois, Aluminum Sheet Mill known as Plancor 652, all of which plants are now under lease to Reynolds Metals Company. The plants sold shall in each instance include the land as described in the lease (and in those instances in which the land is not specifically described in the lease, as presently included within the plancor) together with all buildings, improvements, machinery, equip-

ment, and all other property of every kind owned by the Government presently covered by the leases between Seller and Reynolds Metals Company, and any easements, water rights or rights of way now owned or hereafter acquired by the United States of America or Seller appurtenant to said plants (all of which property hereby sold is hereinafter referred to as the Plants), subject to the following terms and conditions:

(1) The aggregate purchase price is Fifty Million Eighty-One Thousand Nine Hundred Fifty-Eight Dollars ($50,081,958.00). Two Million Five Hundred Eighty-One Thousand Nine Hundred Fifty-Eight Dollars (2,581-958.00), shall be payable on the execution of this agreement together with interest at the rate of four percent (4%) from July 1, 1949 to date of payment; amounts of rental paid by purchaser for the period beginning July 1, 1949 which are to be credited on the down payment shall not bear interest. The balance of the purchase price, Forty-Seven Million Five Hundred Thousand Dollars ($47,500,000.00), shall be payable in annual installments as follows:

July 1, 1950	$1,100,000	July 1, 1963	$1,850,000
" 1, 1951	1,200,000	" 1, 1964	1,950,000
" 1, 1952	1,250,000	" 1, 1965	2,050,000
" 1, 1953	1,300,000	" 1, 1966	2,150,000
" 1, 1954	1,350,000	" 1, 1967	2,250,000
" 1, 1955	1,400,000	" 1, 1968	2,300,000
" 1, 1956	1,450,000	" 1, 1969	2,400,000
" 1, 1957	1,500,000	" 1, 1970	2,500,000
" 1, 1958	1,550,000	" 1, 1971	2,600,000
" 1, 1959	1,600,000	" 1, 1972	2,700,000
" 1, 1960	1,700,000	" 1, 1973	2,800,000
" 1, 1961	1,750,000	" 1, 1974	3,000,000
" 1, 1962	1,800,000		

together with interest at the rate of four per cent per annum an all unpaid balances payable annually.

(2) Reynolds Metals Company will lease the plants from Reynolds Aluminum Company for a period of twenty-five (25) years for an annual consideration not less than the amount required to meet the annual payments of principal and interest required to be made by Reynolds Aluminum Company. Such lease shall also include the obligation on the part of Reynolds Metals Company to pay the taxes on the plants, to insure them or cause them to be insured to meet the requirements of the purchase money mortgages hereinafter mentioned and to maintain the plants in the condition they are in at the time of execution of the lease, ordinary wear and tear excepted. The above lease shall contain a provision that so long as there remains any unpaid balance of the purchase price the lease will not be cancelable except with the consent of Seller.

(3) Purchaser will have the privilege of paying, on the first day of any quarterly period, without penalty, in advance of their maturity any or all annual payments on the unpaid balance of the purchase price or any portion of the next maturing annual payment on the unpaid balance of the purchase price, and any payments of principal so made or any credits shall be regarded as applicable to the annual installments of principal payable in the order of their maturity. This privilege is subject to the limitations contained in paragraph 27 hereof.

(4) Title to the plants will be conveyed by deed or deeds of conveyance and by bill or bills of sale, effective as of July 1, 1949, and Purchaser will execute simultaneously purchase money mortgages on the real property and personal property hereby sold to secure payment of the unpaid balance of the purchase price. Each such mortgage shall secure the entire unpaid balance of the purchase price of all four plants.

(5) Delivery of the deeds, and bills of sale if required, and purchase money mortgages shall supersede and terminate the present leases of the plants between Seller and Reynolds Metals Company as of July 1, 1949, but shall in no way affect any rights or obligations of Seller or Reynolds Metals Company under said leases which had accrued as of said date.

(6) Transfer of title shall be made subject to and including a National Security Clause mutually satisfactory to the Government and to Purchaser. Purchaser shall be given a period of one hundred and twenty (120) days or such additional time as may be mutually agreed upon by Seller and Purchaser within which to obtain approval of a National Security Clause satisfactory to Purchaser. In the event a National Security Clause satisfactory to Purchaser is not so obtained, Purchaser shall have the option to rescind this sales agreement as provided in paragraph 19 hereof in which event the present leases between Seller and Reynolds Metals Company shall be revived as of the date of their termination and continue in full force and effect as if this contract had not been executed. Purchaser agrees

to diligently endeavor to obtain the aforesaid National Security Clause in as short a time as possible.

(7) The balance of the purchase price of Forty-Seven Million Five Hundred Thousand Dollars ($47-500,000) shall be secured by purchase money mortgages executed by Purchaser which, however, shall not constitute a lien on any furniture, fixtures, machinery, equipment and removable partitions now owned or hereafter acquired by Purchaser or Reynolds Metals Company, other than replacements of and improvements upon items sold to Purchaser hereunder, regardless of the manner in which the same may be affixed to the realty and Purchaser and Reynolds Metals Company shall be allowed a reasonable time in which to remove said property in the event of foreclosure of said purchase money mortgages or any of them. In the event of removal of any such property owned by Purchaser or by Reynolds Metals Company, Purchaser shall repair and restore any damage to the plants resulting from such removal. The mortgages shall provide that, except in the case of the failure to make payments on the indebtedness secured, Purchaser shall have sixty days (60) after receipt of notice from Seller of default in which to cure any such default before it shall constitute a breach of covenant for purposes of foreclosure or any other remedy of the mortgagee under any mortgage. The mortgages shall contain additional terms where applicable substantially similar to the terms of the mortgages executed by Reynolds Alloys Company, a wholly owned subsidiary of Reynolds Metals Company in connection with the purchase of an aluminum sheet mill at

Sheffield, Alabama, Plancor 65, and by Reynolds Metals Company in connection with the purchase of a plant at Louisville, Kentucky, Plancor 2023.

In event of defaut by Reynolds Aluminum Company and subsequent sale of the plants Reynolds Metals Company will unconditionally guarantee, to Seller, to the extent of Ten Million Dollars ($10,000,000), payment of the deficiency judgments, if any, or the balance of the mortgage debt remaining after application of the proceeds of sales of the plants to the unpaid balance of the total debt.

(8) Purchaser will obtain at its own expense and affix to the deeds transferring title to the plants and to the purchase money mortgages such Federal and state documentary stamps as may be required by law. Purchaser shall cause the deeds and purchase money mortgages to be duly recorded and will pay all recording fees and other expenses as may be required by law, state and Federal, in connection with such instruments. Seller will make available for Purchaser's inspection and use such abstracts of title or other title papers as are in its custody covering the plants, but it is understood that Seller will not be obligated to furnish any continuation title reports or title insurance or to pay for any title expense or other charges pertaining to the transfer of the plants.

(9) In the event a title examination or examinations instituted subsequent to the acceptance of this agreement by Purchaser and prior to the delivery of the deeds (but in no event more than ninety days after receipt

by Purchaser of such title evidence as Seller is able to deliver) reveals or reveal a defect or defects in title which the Purchaser reasonably regards as rendering the same unmarketable, then this agreement may, at Purchaser's option, be rescinded and nullified by Purchaser as provided in paragraph 19 hereof unless the Seller shall elect to cure at its expense such defect or defects and shall cure the same within sixty days after notice from Purchaser.

(10) Unrefunded utility deposits, if any, inuring to the benefit of Defense Plant Corporation or the United States Government under utility contracts made in connection with the plants are expressly excluded from this sale.

(11) This sale shall expressly include, however, all right, title and interest of the Seller and of the United States of America, without warranty of title, express or implied, in and to all of the facilities, rights and assets, including contract rights, of the plants and of Plancors 226-X, 226-K, 226-O and 652. This sale specifically includes any and all patent rights of Seller and the United States of America only to the extent set forth in the existing leases between Seller and Reynolds Metals Company covering the plants. However, the indemnity which the Seller gives to the Purchaser in connection with patents at plancor 226-X shall be limited to the Aluminum Company of America patents applicable to the facilities on the effective date of the lease of said Plancor.

(12) Purchaser will be responsible for all insurance coverage, taxes, maintenance, costs and other ex-

penses incurred in connection with the captioned properties applying to the period from and after July 1, 1949. If any of the property be damaged or destroyed by any cause after July 1, 1949 and before the full purchase price shall have been paid, such damage or destruction shall not affect this agreement but the full purchase price shall be paid irrespective thereof.

(13) So long as any part of the purchase price remains unpaid, Purchaser shall cause to be maintained insurance coverage of the character and type usually maintained by responsible companies operating similar plants in amount or amounts not less than the balance due under the deferred purchase money mortgage or mortgages. The policies representing such insurance shall contain provisions making loss payable in such manner as shall be satisfactory to the Seller and the deferred purchase mortgages shall contain further insurance provisions substantially similar to those contained in mortgages executed by Reynolds Alloys Company in connection with the purchase of an aluminum sheet mill at Sheffield, Alabama, Plancor 65, and by Reynolds Metals Company in connection with the purchase of a plant at Louisville, Kentucky, Plancor 2023.

(14) Purchaser warrants that it has not employed any person or persons to solicit or secure this agreement for a commission percentage or contingent fee.

(15) No member of or delegate to the Congress of the United States shall be admitted to any share or part of this agreement or any benefit that may arise therefrom, but this provision shall not be construed to extend

to this agreement if made with a corporation for its general benefit.

(16) Neither this agreement nor any rights of the Purchaser herein contained shall be assigned without the express written consent of the Liquidator of War Assets or his successor in function.

(17) For a period of two years from July 1, 1949, and for such additional period as any part of the indebtedness remains unpaid, Purchaser will not, without the written consent of the Liquidator of War Assets, or his successor in function, in any manner sell, assign, transfer, convey, lease or dispose of the Plants, or any of them, or any legal or equitable interest therein of any kind whatever except as otherwise provided herein.

(18) This sales agreement shall also be subject to the following terms and conditions:

(a) The provisions of Executive Order 9908;

(b) Any legal requirements, not inconsistent herewith deemed necessary by the Office of the General Counsel, Liquidator of War Assets.

(19) In the event that this sales agreement is rescinded by Purchaser in accordance with the terms hereof, or in the event that, through no fault of the Purchaser, this transaction is not consummated, the leases of the plants between Seller and Reynolds Metals Company shall be revived as of the time of their termination and shall continue in full force and effect, notwithstanding any of the terms or provisions hereof, as if this sales agreement had never been executed, in such

event any portion of the purchase price or of interest thereon theretofore paid by Purchaser hereunder shall be credited against rentals which have accrued or which will accrue under the leases between Seller and Reynolds Metals Company. In no event shall Seller or Purchaser or Reynolds Metals Company be liable for any accrual of interest on such payments of principal and rent respectively.

(20) Except as specifically provided herein, all provisions of WAA Regulation No. 5, as amended, insofar as applicable to this sale, are hereby specifically waived by direction of the Liquidator of War Assets.

(21) The purchase price applicable to the Sinter plant adjacent to the Hurricane Creek Alumina plant is One Million Six Hundred Seventy-Five Thousand Five Hundred Seven Dollars ($1,675,507.00) of the aggregate purchase price set forth in paragraph (1) hereof, which price for the Sinter plant was determined with respect to the estimated amount of low grade bauxite available to Purchaser. In addition to this base price for said Sinter plant, it is agreed that after 13,200,000 tons of low grade bauxite have been processed in said Sinter plant Purchaser will have the option, exercisable within ninety (90) days thereafter, to pay as additional purchase price for the said Sinter plant (a) the amount of twenty cents (20c) per ton for each ton of low grade bauxite processed through said Sinter plant during the remaining period of twenty-five (25) years from July 1, 1949 or (b) One Million Dollars ($1,000,000.00).

(22) Seller agrees to complete the installation of the fume control equipment at the Troutdale Aluminum Reduction Plant in accordance with the terms of the contract between Seller and Reynolds Metals Company dated as of May 25, 1949. However, in the event the cost of the services under said contract exceeds the amount of Two Million One Hundred Fifty Thousand Dollars ($2,150,000.00), Reynolds Metals Company agrees to claim reimbursement of such excess over said amount of Two Million One Hundred Fifty Thousand Dollars ($2,150,000.00), as may be approved by Seller, only to the extent of sixty and sixty-one hundredths per cent (60.61%) thereof.

(23) Seller will continue to indemnify and save the Purchaser and Reynolds Metals Company harmless from and against any and all claims, damages and liability which may be asserted by adjacent or nearby property owners by reason of noxious or poisonous fumes, gases, vapors or solids arising from the operation of the Troutdale Aluminum Reduction Plant up to the time of the completion of the installation of the fume control equipment but not after December 31, 1950.

(24) If within a period of three years following completion of the installation of the fume control equipment at the Troutdale Aluminum Reduction Plant, but not later than December 31, 1953, the operation of said plant is required to be discontinued by an order of a Court of competent jurisdiction, Purchaser shall have the option to reconvey said plant to Seller whereupon purchaser shall receive a credit on account of its obli-

gation to Seller in the amount of the unpaid balance, less any delinquent installments of principal and/or payments of interest, due Seller on account of the purchase of the said Troutdale plant (the purchase price of which is 39.39% of acquisition cost).

(25) Reynolds Metals Company and purchaser will have an option to purchase bauxite from the Government's stockpiles in Saline and Pulaski Counties, Arkansas, in accordance with the Letter of Intent to Reynolds Metals Company dated September 22, 1949. Such right, however, would terminate in the event of default involving the disposition of the Hurricane Creek Alumina Plant, but prior thereto would be assignable to a Purchaser or lessee of said plant.

(26) Purchaser will receive a credit for the amount Reynolds Metals Company has expended up to Five Hundred Fourteen Thousand Dollars ($514,000.00) in putting potline 2C at the Jones Mills Aluminum Reduction Plant into operating condition less the amount thereof it has deducted from rental due on said potline. It will also receive a credit for the amount it or Reynolds Metals Company will have spent or will spend for putting potline 1C at said plant into operating condition not in excess of Five Hundred Fourteen Thousand Dollars ($514,000.00).

(27) With respect to all payments mentioned in paragraph (1) hereof which are made between July 1, 1949 and June 30, 1950, and/or rental payments which had accrued as of June 30, 1949 for the annual lease period or portion thereof ending June 30, 1949 under

the leases, as amended, between Seller and Purchaser covering the Hurricane Creek Alumina Plant (Plancor 226-X), the Jones Mills Aluminum Reduction Plant (Plancor 226-K) the Troutdale Aluminum Plant (Plancor 226-O) and the McCook Aluminum Sheet Mill (Plancor 652), Purchaser shall have the option to make payments, in lieu of cash, in aluminum pig or ingot up to Nineteen Million Five Hundred Sixty-One Thousand Seven Hundred Eighty - Three Pounds (19,561,783 pounds) of the grade and Federal specifications designated by the Munitions Board as acceptable in lieu of cash for stockpile requirements, at the prevailing market price therefor, including prevailing industry terms for the payment of freight at the time such payments are made. Thereafter, with respect to all payments made between July 1, 1949 and June 30, 1950, and in each subsequent year, Purchaser shall have the option to make payments, in lieu of cash, in aluminum pig or ingot of the grade and specifications so designated up to approximately fifty per cent (50%) of each additional amount (over and above the first 60,000,000 pounds recommended for the fiscal year beginning July 1, 1949) of the quantity, type and specification indicated from time to time by the Munitions Board as acceptable pursuant to Section 204(e) of Public Law 152, 81st Congress, for the period designated by the Munitions Board. Such approximately fifty per cent (50%) for any period shall be the percentage which is determined by Seller to represent the Purchaser's equitable proportions as compared to other Purchasers and lessees of Government-built aluminum plants, of

the quantity designated by the Munitions Board for such period, but shall not be less than forty-five per cent (45%), nor more than fifty-five per cent (55%), of the quantity designated by the Board for such period. With respect to payments due and payable July 1, 1950 and thereafter Purchaser shall advise Seller, in writing, of the extent to which it elects to exercise its option to make payment in aluminum pig or ingot pursuant to this paragraph, not later than fifteen days (15) prior to any date on which it desires to make payment in aluminum pig or ingot and a failure of Purchaser to comply with such election on the date such payment is to be made shall be deemed to be a default unless Purchaser tenders payment in cash in lieu of aluminum pig or ingot on the date such payment is to be made and such cash tender is accepted by Seller. The right of Seller to refuse to accept such cash tender, however, shall be exercised only when Purchaser has failed to use all reasonable means at its command to comply with such election. Any payment in aluminum hereunder shall be considered to have been made when Seller receives a written notice, signed by Purchaser, formally advising that the aluminum is ready for immediate shipment and tendering immediate delivery of the quantity and quality specified and requesting Seller's instructions for shipment and/or storage at Purchaser's plant of manufacturure, provided that a failure by Seller to comply promptly with Purchaser's instruction for shipment to points designated by Seller within the Continental United States and/or for storage at Purchaser's plant of manufacture, or failure to make phys-

ical delivery of aluminum of the quantity or quality or specifications designated shall be deemed to be a default unless remedied by Purchaser promptly after receipt of notice of any error or defect. With respect to any aluminum so paid, all risk of loss, including without limitation claims for losses and damages in connection with the care and handling of the metal, shall be deemed to have passed from Purchaser to Seller when the aluminum is placed aboard cars at Purchaser's plant of manufacture pursuant to shipping instruction from Seller. Purchaser shall have the option to make any accelerated payments as provided in paragraph (3) above in aluminum pig or ingot, subject to the quantity and quality limitations above specified, at the prevailing market price, including prevailing industry terms for payment of freight, at the time on which tender of such accelerated payment is made, provided that the amount of aluminum so tendered in any period for regular and accelerated payments and interest shall not exceed approximately fifty per cent (50%), as defined above, of the quantity designated by the Munitions Board as acceptable for such period.

(28) Purchaser will grant to Seller the right to continue to use the area at the Hurricane Creek Alumina Plant on which bauxite stockpiles are presently located for the purpose of continuing such stockpiles there until such time as they are consumed and Purchaser will grant to Seller such easement or right of way until such bauxite stockpiles are consumed as will afford Purchaser and its agents full right of ingress and egress thereto and therefrom.

Until such time as the present stockpiles of bauxite within the plant fence at the Hurricane Creek Alumina Plant have been consumed Purchaser will grant to Seller such easement or right as will permit the continuance and use on Hurricane Creek plant property of scales, scale house and laboratory and to afford Seller and its agents full right of ingress and egress thereto and therefrom.

(29) It is agreed that spare parts capitalized under Plancor 1646, materials and inventories not capitalized under the plancors 226-X, 221-K, 226-O, and 652 are not included in this sale and that purchaser will continue to be responsible for such spare parts materials and inventories until such time as Seller elects to remove them from the plants at any time prior to December 31, 1950. Purchaser shall give Seller assignable rights of ingress and egress for the purpose of such removal and shall cooperate with and assist Seller in processing the raw materials to saleable form.

This agreement is executed in quadruplicate. If the foregoing terms and conditions are acceptable to you, please indicate your acceptance by executing and returning to this Administration three copies of this agreement within seven days from the date hereof.

Very truly yours,

PAUL L. MATHER
Liquidator of War Assets
General Services Administration

Accepted this 21st day of December, 1949

REYNOLDS ALUMINUM COMPANY
By R. S. Reynolds Jr.
President

To the extent that the foregoing letter of intent affects Reynolds Metals Company it is accepted this 21st day of December, 1949

REYNOLDS METALS COMPANY
By R. S. Reynolds Jr.
President

GENERAL SERVICES ADMINISTRATION

DEC. 20 1949

Reynolds Aluminum Company
Reynolds Metals Building
Third and Grace Streets
Richmond 19, Virginia 25001

Attention: Mr. Richard S. Reynolds, Jr., President

Gentlemen:

Referring to the Letter in Intent dated December 15, 1949 covering the sale to you of the Hurricane Creek Alumina Plant, the Jones Mills and Troutdale Reduction Plants, and the McCook Sheet Mill, this will confirm our understanding reached during the negotiations for the sale of these plants and evidence our agreement that against the down payment of $2,581,958 mentioned in paragraph (1) of said Letter of Intent you will receive a credit in the amount of all rents which Reynolds Metals Company has paid on account of the four above mentioned plants for the period from July 1, 1949 to the date of the down payment.

You will then pay as the down payment required by paragraph (1) of the Letter of Intent the difference

between the amount of $2,581,958 and the credit above mentioned together with interest on such difference at the rate of four per cent per annum from July 1, 1949.

Very truly yours,

PAUL L. MATHER
Liquidator of War Assets
General Services Administration

Accepted this 21st day of December, 1949, with the understanding that the above rents which are to be credited against the down payment are gross rents and not net rents.

REYNOLDS ALUMINUM COMPANY

By R. S. Reynolds Jr.
President

To the extent that the foregoing letter affects Reynolds Metals Company it is accepted this 21st day of December, 1949, with the understanding that the above rents which are to be credited against the down payment are gross rents and not net rents.

REYNOLDS METALS COMPANY

By R. S. Reynolds Jr.
President

GENERAL SERVICES ADMINISTRATION

DEC. 20 1949

Reynolds Aluminum Company
Reynolds Metals Building
Third and Grace Streets
Richmond 19, Virginia

25002

Attention: Mr. Richard S. Reynolds, Jr., President

Gentlemen:

Referring to the following language in paragraph (7) of the Letter of Intent dated December 15, 1949 cover-

ing the sale to you of the Hurricane Creek Alumina Plant, the Jones Mills and Troutdale Reduction Plants and the McCook Sheet Mill:

> "In event of default by Reynolds Aluminum Company and subsequent sale of the plants Reynolds Metals Company will unconditionally guarantee, to Seller, to the extent of Ten Million Dollars ($10,000,000.00), payment of the deficiency judgments, if any, or the balance of the mortgage debt remaining after application of the proceeds of sales of the plants to the unpaid balance of the total debt."

it is understood and agreed between us that the $10.-000,000.00 limitation mentioned therein upon the guaranty by Reynolds Metals Company is the maximum total possible liability of Reynolds Metals Company under the guaranty set forth in said Paragraph.

Very truly yours,

PAUL L. MATHER
Liquidator of War Assets
General Services Administration

Accepted this 21st day of December, 1949

REYNOLDS ALUMINUM COMPANY
By R. S. Reynolds Jr.
President

To the extent that the foregoing letter affects Reynolds Metals Company it is accepted this 21st day of December 1949

REYNOLDS METALS COMPANY
By R. S. Reynolds Jr.
President

GENERAL SERVICES ADMINISTRATION

DEC. 20 1949

Reynolds Aluminum Company
Reynolds Metals Building
Third and Grace Streets
Richmond 19, Virginia

25003

Attention: Mr. Richard S. Reynolds, Jr., President

Gentlemen:

Referring to the Letter of Intent dated December 15, 1949 covering the sale to you of the Hurricane Creek Alumina Plant, the Jones Mills and Troutdale Reduction Plants and the McCook Sheet Mill, it is understood and agreed between us that upon your acceptance thereof, the leases, except as to the rights and obligations specifically reserved, are cancelled and terminated by virtue of such acceptance as of July 1, 1949.

It is further agreed that rental payments over the minima as provided in the Hurricane Creek and McCook leases accruing during the period from the commencement of the respective fourth lease years through June 30, 1949 shall be determined in the case of the McCook lease by calculating the sales during the fourth lease year and prorating such sales as of the effective date of the sale and in the case of the Hurricane Creek lease by calculating the production during the fourth lease year and prorating such production as of the effective date of the sale. Excess rent over the minima, if any, shall be paid within the periods

prescribed in the respective leases for excess rental payments.

Very truly yours,

PAUL L. MATHER
Liquidator of War Assets
General Services Administration

Accepted this 21st day of December, 1949

REYNOLDS ALUMINUM COMPANY
By R. S. Reynolds Jr.
President

To the extent that the foregoing letter affects Reynolds Metals Company it is accepted this 21st day of December, 1949

REYNOLDS METALS COMPANY
By R. S. Reynolds Jr.
President

APPENDIX B

Opinion of the Circuit Court of the State of Oregon for the County of Multnomah, dated March 15, 1954.

MEMORANDUM

The question presented in this case is whether or not the plaintiff had such an interest in the machinery and equipment of the Troutdale Aluminum Plant under the Letter of Intent executed on December 21, 1949, between Paul L. Mather, Liquidator of War Assets, General Services Administration, and Reynolds Aluminum Company as to render such machinery and equipment subject to tax to the plaintiff under Section 110-312, O.C.L.A. (now 308.105 O.R.S.) on January 1, 1950.

The Letter of Intent which is set out as an exhibit to the complaint is said by the plaintiff to be merely a memorandum in the nature of an earnest money receipt, while the defendants just as insistently contend that it constitutes a full scale contract for the sale of property.

The right of a state to tax property sold under contract of sale by the United States to a private person under contract of sale is one over which there has been much controversy.[1] Counsel have discussed the history

[1]McCulloch v. Md., 4 Wheat. 316, 4 L.Ed. 579 (1819)
Osborne v. Bank of the United States, 9 Wheat. 739, 6 Ed. 204 (1824)
Carroll v. Safford, 3 How. 441, 11 L.Ed. 671 (1845)
Witherspoon v. Duncan, 71 U.S. 210, 18 L.Ed. 339 (1866)
First National Bank v. Kentucky, 9 Wall. 353, 19 L.Ed. 701 (1870)
Thompson v. Union Pacific RR. Co., 9 Wall. 579, 19 L.Ed. 792 (1870)

of the law in this regard in great detail both in their briefs and in the oral argument.

The leading case is *S.R.A. v. Minnesota,* 327 U.S. 558. The Court there held that

> "The right of a State to the tax realty directly depends primarily upon its territorial jurisdiction over the area" (p. 562).

There can be no question of the territorial jurisdiction of the State of Oregon in this case. On page 2 of plaintiff's brief is the following statement:

> "By express legislation, Congress has consented to state and local taxation of all *real* property owned by RFC and DPC; see Section 607 of Title 15, U.S.C. Therefore the land and improvements thereon at the Troutdale plant were taxable while the plant was owned by RFC and DPC, and they were carried on the Multnomah County assessment roll beginning in 1942.

Van Brocklin and Stacy v. Anderson, 117 U.S. 151, 29 L.Ed. 845 (1886)

United States v. Milwaukie, 100 Fed. 828 (E.D. Wis. 1893)

Mint Realty Co. v. Philadelphia, 218 Pa. 104, 66 Atl. 1130 (1907)

Baltimore Shipbuilding & DD. Co. v. Baltimore, 195 U.S. 375, 49 L.Ed. 242 (1904)

Copp v. State, 69 W. Va. 439, 71 S.E. 580 (1911)

Nehalem Timber Co. v. Columbia County, 97 Or. 100, 189 P. 212 (1920)

Irwin v. Wright, 258 U.S. 219, 66 L.Ed. 573 (1922)

Clallam County v. United States, 263 U.S. 341, 68 L.Ed. 328 (1923)

People v. Burke, 204 A.D. 557, 198 N.W.S. 601 (1923)

People v. Burke, 128 Misc. 195, 217 N.Y.S. 803 (1926)

Webb v. Clark County, 87 Ind. Ap. 103, 159 N.E. 19 (1927)

Port Angeles Western R.R. Co. v. Clallam County, 20 F. (2d) 202 (W.D. Wash. 1927)

City of New Brunswick v. U.S., 276 U.S. 547, 72 L.Ed. 693 (1928)

"Because the plant was transferred to the United States in 1949, the above Congressional consent was not applicable for 1950, which is the tax year involved in this litigation; but the company has conceded (see paragraph IV of the complaint in this case) that in any event the Troutdale real property was taxable to it for 1950 as a lessee from the United States, under Chapter 202, Oregon Laws 1947, a statute which we will discuss in another connection later in this memorandum.

"Therefore there is no issue in this litigation as to the taxability of the plaintiff's real property. It has been taxable and taxed by Multnomah County and the other political subdivisions in whose jurisdiction it falls, at all times since the plant was constructed."

Lincoln County v. Pacific Spruce Corp., 26 F. (2d) 435 (CCA 9, 1928)

Hance v. New Brunswick, 7 N.J. Mis. R. 610, 146 A. 673 (1929)

Bancroft Inv. Corporation v. Jacksonville, 157 Fla. 546, 27 S. 2d 162 (1946)

United States v. Power County, 21 F. Supp. 684 (D Ida. 137)

City of Springfield v. U.S., 99 F. (2d) 860 (CCA 1, 1938)

Hoskins v. Abbott, 191 Okl. 158, 127 P. (2d) 815 (1924)

A.B.R. Corporation v. Newark, 131 N.J.L. 147, 35 A. 2d 472 (1944)

United States v. Allegheny County, 322 U.S. 174, 88 L.Ed. 1209 (1944)

Ken Realty Co. v. Johnson, 138 F. (2d) 809 (CCA 5, 1943)

Ken Realty Co. v. Alabama, 247 Ala. 610, 25 So. 2d 675, 166 A.L.R. 588 (1946)

S.R.A. Inc. v. Minnesota, 213 Minn. 487; 219 Minn. 493; 327 U.S. 558

Norbet Corporation v. Newark, 135 N.J.L. 314, 51 A. 2d 541 (1947)

Lederman v. Bodovitz, 198 Olk. 276, 177 P. (2d) 1002 (1947)

Eisley v. Nohan, 31 Cal. 2d 367, 192 P. (2d) 5 (1948)

Land O'Lakes Dairy Co. v. Sebeka, 225 Minn. 540; 229 Minn. 263

Okla. Tax Commission v. Texas Co., 326 U.S. 342, 93 L.Ed. 721 (1949)

It would appear to be clear that if the state could tax the realty, it had territorial jurisdiction. It is also clear that if a crime, such as murder, were committed at the Troutdale Plant, the state courts would have jurisdiction. If the right to tax is dependent upon the territorial jurisdicion of the state to tax it would seem to be clear that the state had the right to tax regardless of whether the property was owned by the United States or not.

> "Under these assumptions the existence of territorial jurisdiction in Minnesota so as to permit state taxation depends on whether there was a transfer of the property by the contract of sale" 327 U.S. 564.

In the instant case the State of Oregon had territorial jurisdiction regardless of "whether there was a transfer of the property" by the Letter of Intent. So if the validity of the tax depends on territorial jurisdiction, the tax is valid.

However, the solution of this case is not so simple as that. If the state has territorial jurisdiction it may tax the property of private persons, but it still would not have the right to tax the property of the United States. Thus the S.R.A. opinion proceeds to say:

> "Territorial jurisdiction in Minnesota does not dispose of this tax problem. The nub of this, that is the immunity from state taxation of property to which the United States holds legal title remains" (p. 565).

The Supreme Court then discusses and distinguishes the land grant cases and says:

> "We think the public policy of national develop-

ment and federal tax collection justify the limitation on state taxing power announced by the foregoing decisions. We do not, however, conclude that their rationale leads to an exemption from taxation of all lands in which the United States holds legal title as security for the purchase price. To say the payment of the purchase price is a necessary condition precedent to the loss of federal immunity is to make the rule too mechanical. It should be sufficiently flexible to subject real private rights, disentangled from federal policies, to state taxation. This has been the holding in mining claims. Where beneficial interest has passed to a vendee, the retention of legal title does not give a significant difference from the situation of a deed with a lien retained or a mortgage back to secure the purchase money."

The first question is whether or not the Letter of Intent is such a contract as would pass the equitable title to Reynolds. The first paragraph of the Letter of Intent reads as follows:

> "General Services Administration (hereinafter referred to as Seller) hereby sells to Reynolds Aluminum Company (hereinafter referred to as Purchaser), a wholly owned subsidiary of Reynolds Metals Company, and Purchaser hereby buys the Hurricane Creek, Arkansas, Alumina Plant known as Plancor 226-X; the Jones Mills, Arkansas, Aluminum Reduction Plant known as Plancor 226-K; the Troutdale, Oregon, Aluminum Reduction Plant known as Plancor 226-O; and the McCook, Illinois, Aluminum Sheet Mill known as Plancor 652, all of which plants are now under lease to Reynolds Metals Company. The plants sold shall in each instance include the land as described in the lease (and in those instances in which the land is not specifically described in the lease, as presently included within the plancor) together with all buildings, improvements, machinery, equip-

ment, and all other property of every kind owned by the Government presently covered by the leases between Seller and Reynolds Metals Company, and any easements, water rights or rights of way now owned or hereafter acquired by the United States of America or Seller appurtenant to said plants (all of which property hereby sold is hereinafter referred to as the Plants), subject to the following terms and conditions:"

Paragraphs 4, 5 and 6 of the terms and conditions are as follows:

"(4) Title to the plants will be conveyed by deed or deeds of conveyance and by bill or bills of sale, effective as of July 1, 1949, and Purchaser will execute simultaneously purchase money mortgages on the real property and personal property hereby sold to secure payment of tthe unpaid balance of the purchase price. Each such mortgage shall secure the entire unpaid balance of the purchase price of all four plants.

"(5) Delivery of the deeds, and bills of sale if required, and purchase money mortgages shall supersede and terminate the present leases of the plants between Seller and Reynolds Metals Company as of July 1, 1949, but shall in no way affect any rights or obligations of Seller or Reynolds Metals Company under said leases which had accrued as of said date.

"(6) Transfer of title shall be made subject to and including a National Security clause mutually satisfactory to the Government and to Purchaser. Purchaser shall be given a period of one hundred and twenty (120) days or such additional time as may be mutually agreed upon by Seller and Purchaser within which to obtain approval of a National Security Clause satisfactory to Purchaser. In the event a National Security Clause satisfactory to Purchaser is not so obtained, Purchaser shall have the option to rescind this sales agreement as pro-

vided in paragraph 19 hereof in which event the present leases between Seller and Reynolds Metals Company shall be revived as of the date of their termination and continue in full force and effect as if this contract had not been executed. Purchaser agrees to diligently endeavor to obtain the aforesaid National Security Clause in as short a time as possible."

Paragraph 9 of the conditions is in the following language:

"(9) In the event a title examination or examinations instituted subsequent to the acceptance of this agreement by Purchaser and prior to the delivery of the deeds (but in no event more than ninety days after receipt by Purchaser of such title evidence as Seller is able to deliver) reveals or reveal a defect or defects in title which the Purchaser reasonably regards as rendering the same unmarketable, then this agreement may, at Purchaser's option, be rescinded and nullified by Purchaser as provided in paragraph 19 hereof unless the Seller shall elect to cure at its expense such defect or defects and shall cure the same within sixty days after notice from Purchaser."

Paragraph 19 of the conditions reads as follows:

"(19) In the event that this sales agreement is rescinded by Purchaser in accordance with the terms hereof, or in the event that, through no fault of the Purchaser, this transaction is not consummated, the leases of the plants between Seller and Reynolds Metals Company shall be revived as of the time of their termination and shall continue in full force and effect, notwithstanding any of the terms or provisions hereof, as if this sales agreement had never been executed, in such event any portion of the purchase price or of interest thereon theretofore paid by Purchaser hereunder shall be credited against rentals which have accrued or which will

> accrue under the leases between Seller and Reynolds Metals Company. In no event shall Seller or Purchaser or Reynolds Metals Company be liable for any accrual of interest on such payments or principal and rent respectively."

The language of this carefully drawn document, although not necessarily conclusive, is entitled to great weight. It is significant that it is denominated a "sales agreement" and not an option or an earnest money receipt. It is also significant that by the language of paragraph 9, above quoted, the existence of marketable title is not made a condition precedent to the effectiveness of the sale but merely confers a right to rescind.[1] In view of this, plaintiff's contention that equitable title did not pass to Reynolds because the United States had not furnished evidence of marketable title cannot be sustained. The fact that evidence of marketable title had not been furnished does not prevent a purchaser from becoming the equitable owner of property or prevent an equitable conversion from taking place. It is not unusual for contracts for the sale of property to defer the furnishing of proof of marketable title to the time of final payment of the purchase price. Thus it is said in 55 Am. Jur., Vendor and Purchaser, Sec. 277, p. 722:

> "Ordinarily, if the vendor in a contract for the sale of land is able to convey a good title when the time for the performance of the contract arrives, he is deemed to have fulfilled his obligation although his title may have been defective at the time he entered into the contract, and it is the prevailing American doctrine that ordinarily, in the absence of misrepresentation or fraud, a vendee cannot, prior

[1]Wurfel v. Bockler, et al, 106 Or. 579.

to the time fixed by the contract for conveyance, complain that the vendor's title is defective or encumbered. This rule is said to be predicated upon the assumption that the vendor may, and probably will, be able to perform and convey a title as contracted for at the time the contract requires performance, and that consequently, until that time has arrived, the vendee is in no position to complain. The mere fact the title to the land is encumbered, or is otherwise imperfect, at the time the contract was entered into, or at any time prior to the date fixed for its completion, will not, of itself, constitute a defense to an action for the recovery of instalments falling due at an earlier date, and is not a ground for a rescission of the contract when such encumbrance or other defect may be removed within the time fixed for the completion of the purchase, even though it is not known whether the vendor will be able to obtain perfect title in time for performance; in such case he has the right to receive payments to be made by the vendee prior to the time set for delivery of the deed, notwithstanding his title is at such time defective."

See also: 8 Thompson On Real Property, Sec. 4584, p. 535.

Neither does paragraph 6 prevent the Letter of Intent from being a binding contract. This was expressly conceded by the plaintiff at the oral argument; and it is plain that the provision that the parties should agree on a National Security Clause was not a condition precedent, but merely gave to the plaintiff a right to rescind if the parties did not agree.

The provisions that the contract and all conveyances and mortgages between the parties pursuant thereto should be effective as of July 1, 1949, and that the lease to Reynolds from the government should termi-

nate as of that date strongly point to the conclusion that this was far more than an option or earnest money receipt.

The next question is whether or not the failure of the sheriff or assessor to note that the levy was "subject to fee title remaining in the United States of America," as was done in the S.R.A. case, is fatal to the validity of the tax.[1] Plaintiff strongly argues that it is.

This, however, is not essentially a question of the validity of the tax but a question as to the proper procedure for its collection. In any event, plaintiff cannot be prejudiced thereby because, as is pointed out in the S.R.A. case, the fact that the United States holds the legal title as security has no effect on the amount of the tax. It might be prejudicial to the rights of the United States if the County should seek to foreclose the tax lien without regard to the rights of the United States, but that can be taken care of by including such a phrase in the foreclosure proceedings. Of course, the failure to include such a clause would not cause the United States to be divested of legal title by the foreclosure proceedings, but such an omission might possibly (the possibility seems remote) mislead a prospective purchaser at a tax sale and result in an easily removable cloud[2] upon the legal title of the United States.

---

[1]It has been argued that such protection is unnecessary. See Note 46, Columbia Law Review 660, 664.

[2]New Brunswick v. United States, 276 U.S. 547, 556; Northwestern Bank v. Freeman, 171 U.S. 620, 629; Feigenbaum v. City of New York, 139 Misc. 863, 866, 249 N.Y. Supp. 527; Black v. Banks, 327 Mo. 341, 37 S.W. (2d) 594; Harrison v. Orr, 296 S.W. 871, 874.

But such a possibility is too remote to be anticipated until foreclosure proceedings should be instituted, if ever; and since it is the United States that would be prejudiced and not Reynolds it is only the United States and not Reynolds which would have standing to object or complain in such event.

The next question is whether the so-called unitary rule prevents property from being assessed as was done here. This rule is that property is to be assessed as a unit and not according to the various interests owned by various parties. The property here in question has been assessed as a unit and the assessment to Reynolds is in compliance with that rule.

This conclusion is strongly fortified by the case of *Hines Lumber Co.* v. Lane County, 196 Or. 420. There our Supreme Court held that the contention that "Oregon laws disregard interests less the legal title for the collection of ad valorem taxes on personal property" could not be sustained and said:

> "Since pursuant to Sec. 110-312 O.C.L.A. the assessment is against the property and may be assessed either 'in the name of the owner or of any person having possession or control thereof' the logs in question, being in the possession and control of the company at the time of the assessment, there being no immunity in favor of the federal government, were legally assessed" (p. 429).

The defendants may prepare findings based upon the facts which have been admitted or stipulated and conclusions based upon this opinion, and a judgment in their favor.

Dated at Portland, Oregon, this 15th day of March, 1954.

/s/ LOWELL MUNDORFF
Presiding Judge

CIRCUIT COURT'S SUPPLEMENTARY ORAL OPINION

(Announced by Judge Mundorff on April 15, 1954)

THE COURT: Well, in the first place, I want to say that I don't have any particular pride in the opinion. The rushing business here has been such that I have not been able to spend any time writing very precise opinions, writing the kind of opinions that I would like to write. This could have been re-written at least twice with great profit so far as the opinion is concerned.

I have always regarded this as a practical problem. The question was whether or not it fell within the S.R.A. doctrine from the practical standpoint or not, and I haven't tried to treat it theoretically, and perhaps I haven't done justice to some of the various theories involved, but it seemed to me that the S.R.A. case decided primarily that the average ordinary contract of sale for real property as we generally know it where the purchaser takes possession and makes payment with installments on the purchase price gives the purchaser such a right as would be taxable where the property is sold by the Government, private corporation, or an individual under those circumstances. So then the question was, as far as I was concerned, whether or not this particular contract was significantly different from the type of contract with which the Supreme

Court was dealing in the S.R.A. case, and the stress was laid in the argument as again it is laid here on the two clauses which deal with title, and with a National Security Clause.

Now, I did not stress possession particularly, but I think it's clear that possession was under the Letter of Intent and not under the leases, because the leases were cancelled without any qualification except the general qualifications in the contract.

Then the question was of title. Now, there are always conditions as to title in a conditional sales contract, because the conveyance is never made until—or is rarely made—let's put it that way—the usual situation is the conveyance is not made until the purchase price is paid, and there may come many things that will cloud the title. The title may be clouded at the inception of the contract, or it may be clouded at the time of performance. Those are problems that arise in those cases. Some of them are not always simple problems to solve, but it seemed to me that the problem of title here was no more serious than it is in 99 percent of the sales contracts involving land. That is always sometimes a condition there involved, and if you're going to distinguish every case where there is some problem or condition regarding title, you will wind up by distinguishing 99 percent of these contract of sale cases out of the S.R.A. case, which I do not think would be justified, and then it seems to me significant, although the practical effect may be somewhat similar and may be the same. This was touched upon not as a condition, but as giving a

right to rescind, which has some practical differences, I think, although you can waive condition, but it may be, and I think probably you have to affirmatively waive the condition while you have to exercise a right to rescind, and that may be pretty fine, but I think it may make some practical difference at times, and the same way with a National Security Clause.

Now, if that were made a condition precedent, I would have some difficulty. I would have real difficulty. But since it was only made a question of right to rescind, I don't think that that changes the obligations because many things may give a right to rescind, and I don't think you can say that a contract is conditional where there is a right to rescind as we pointed out in the argument. These obligations of various kinds always have some degree of uncertainty and a question of absolute obligation is one that runs you into metaphysics if you go very far. So looking at this practically in trying to compare the case that we have here with the case of the S.R.A.—the case involved in the S.R.A. case—it doesn't seem to me that I can draw any distinctions that I couldn't draw in somewhere around 90 or 95 percent of the cases that come before me, and I don't feel I can unless I can point to something tangible and make a distinction because it seems to me that in any case you're going to have conditions of title as serious as you have in the S.R.A. case, and that a National Security Clause was deliberately made a question of rescision rather than a condition, which I think removed all question of condition, and the fact they cancelled the lease and they provided the risk of loss was upon Rey-

nolds seems to confirm to me that for all practical purposes Reynolds was the owner of this property subject to the right of the Government for a lien to secure the purchase price, and looking at it from a practical standpoint and without trying to be too precise or theoretical about it, I don't see how I can hold for Reynolds in this case in the face of the S.R.A. case which seems to me to be so close that I am bound by it.

I entered this case with absolutely no pre-dispositions one way or the other. I just feel compelled by the S.R.A. case to hold against Reynolds in this matter, and I will have to adhere to my previous decision. I won't say I adhere to the opinion, because perhaps there is language in the opinion I can't justify.

April 15, 1954.

APPENDIX C

Opinion of the Supreme Court of the State of Oregon, filed September 21, 1955.

Tooze, J.

This is a suit to enjoin the enforcement and collection of certain personal property taxes for the year 1950, brought by Reynolds Aluminum Company, a corporation, as plaintiff, against Multnomah county, Terry D. Schrunk, as sheriff and tax collector, Wiley W. Smith, as assessor, and Soi Cohn, as county clerk, respectively, of Multnomah county, as defendants. Decree was entered in favor of defendants, and plaintiff appeals.

The personal property tax involved in this litigation is against the machinery and equipment of an aluminum manufacturing plant located at Troutdale, in Multnomah county, Oregon, now owned by plaintiff.

The Troutdale plant was constructed for the United States government in 1942 by Defense Plant Corporation. A few years later the Defense Plant Corporation was dissolved, and Reconstruction Finance Corporation succeeded to the ownership of the plant. About August, 1949, for reasons not material here, Reconstruction Finance Corporation conveyed title to the plant to the United States.

In 1946, Reconstruction Finance Corporation (acting through the War Assets Administrator) leased the Troutdale plant (and three other aluminum plants) to Reynolds Metals Company, a corporation. Reynolds

Metals Company immediately took possession of the plant under this lease and commenced manufacturing operations therein.

In the latter part of 1949, after Reynolds Metals Company had been in possession of the Troutdale plant as lessee for about three years, an opportunity arose to purchase this and the three other plants owned by the United States. The purchase agreement, entitled "Letter of Intent", was executed on December 21, 1949. This letter of intent provided that the four plants in question were purchased by the plaintiff, Reynolds Aluminum Company, a corporation, and a wholly-owned subsidiary of Reynolds Metals Company.

No question is involved in this case concerning taxes levied against the real property at the Troutdale plant. By congressional act, all real property owned by Reconstruction Finance Corporation and Defense Plant Corporation was made subject to state and local taxation (USCA, Title 15, § 607). Therefore, the land and land improvements at Troutdale were taxable while the plant was owned by Reconstruction Finance Corporation and Defense Plant Corporation, and they were carried on the Multnomah county assessment roll beginning in 1942.

The manufacturing machinery and equipment (classified as tangible personal property by ORS 307.020 (3)) of the Troutdale plant were placed on the Multnomah county assessment roll as of one o'clock a.m. of January 1, 1950, as the property of plaintiff, and at an assessed value of $3,410,000. The tax levied

thereon and here in issue is in the sum of $199,144, plus interest. The time for assessments against real and personal property is fixed (for the year 1950) by the provisions of § 110-335, OCLA, as amended by ch 440, § 4, Oregon Laws 1941. This section of the statute was later amended: ch 701, Oregon Laws 1953 (ORS 308.210), but the time for assessment remains the same; viz., January 1 of each year, at 1 a.m.

In its brief filed in this court, plaintiff states the issues before us as follows:

> "The general issues are, first, whether an allegedly 'preliminary' purchase and sale agreement, entered into on December 21, 1949 between appellant as vendee and the United States as vendor, automatically and immediately transferred the equitable and beneficial ownership of the machinery and equipment at the above plant from the United States to appellant, so that the federal constitution gave conditional sanction to taxation of this machinery and equipment on January 1, 1950, or whether the real ownership of the machinery and equipment remained in the United States until June 29, 1950, when the United States conveyed the plant to the company by a deed and bill of sale; and second, if this first question is resolved against appellant, whether the Oregon statutes in effect in 1950 authorized the taxation of personal property in these circumstances, subject to the condition on which the United States Supreme Court has sanctioned such taxation."

The solution of the problem rests entirely upon the interpretation we place upon the provisions of the letter of intent. Although entitled "Letter of Intent", nevertheless, upon the formal acceptance of its terms by the plaintiff and Reynolds Metals Company, on

December 21, 1949, it became, in our opinion, a contract for the sale and purchase of the Troutdale plant (along with the three other aluminum plants). In construing this contract, we must construe it as a whole, applying the well-understood and established rules for the construction of written instruments.

It is unnecessary to set forth the contract in full. We will quote a few of the express provisions contained therein which, we believe, will be sufficient to establish the status of the personal property in question as to ownership for taxation purposes. From a factual standpoint, the primary question is whether equitable title to the property rested in plaintiff on and prior to January 1, 1950. This must be determined from the agreement itself. The contract provides:

"Dec 15 1949
25000

"Reynolds Aluminum Company
Reynolds Metals Building
Third and Grace Streets
Richmond 19, Virginia

"Attention: Mr. Richard S. Reynolds, Jr., President

"Re: Plancor 226-X, Hurricane Creek, Arkansas;
Plancor 226-K, Jones Mill, Arkansas;
Plancor 226-O, Troutdale, Oregon;
Plancor 652, McCook, Illinois.

"Gentlemen:

"General Services Administration (hereinafter referred to as *Seller*) *hereby sells* to Reynolds Aluminum Company (hereinafter referred to as *Purchaser*), a wholly owned subsidiary of Reynolds Metals Company, and *Purchaser hereby buys* the Hurricane Creek, Arkansas, Alumina Plant known as Plancor 226-X; the Jones Mills, Arkansas, Alu-

minum Reduction Plant known as Plancor 226-K; the Troutdale, Oregon, Aluminum Reduction Plant known as Plancor 226-O; and the McCook, Illinois, Aluminum Sheet Mill known as Plancor 652, all of which plants are now under lease to Reynolds Metals Company. The plants sold shall in each instance include the land as described in the lease (and in those instances in which the land is not specifically described in the lease, as presently included within the plancor) together with all buildings, improvements, machinery, equipment, and all other property of every kind owned by the Government presently covered by the leases between Seller and Reynolds Metals Company, and any easements, water rights or rights of way now owned or hereafter acquired by the United States of America or Seller appurtenant to said plants (all of which property hereby sold is hereinafter referred to as the Plants), subject to the following terms and conditions:

"(1) The aggregate purchase price is Fifty Million Eighty-One Thousand Nine Hundred Fifty-Eight Dollars ($50,081,958.00). Two Million Five Hundred Eighty-One Thousand Nine Hundred Fifty-Eight Dollars ($2,581,958.00), *shall be payable on the execution of this agreement* together with interest at the rate of four percent (4%) from July 1, 1949 to date of payment; amounts of rental paid by purchaser for the period beginning July 1, 1949 which are to be credited on the down payment shall not bear interest. The balance of the purchase price, Forty-Seven Million Five Hundred Thousand Dollars ($47,500,000.00), shall be payable in annual installments as follows:

"* * * * *

"(2) Reynolds Metals Company will lease the plants from Reynolds Aluminum Company for a period of twenty-five (25) years for an annual consideration not less than the amount required to meet the annual payments of principal and interest required to be made by Reynolds Aluminum Com-

pany. *Such lease shall also include the obligation on the part of Reynolds Metals Company to pay the taxes on the plants, to insure them or cause them to be insured to meet the requirements of the purchase money mortgages hereinafter mentioned and to maintain the plants in the condition they are in at the time of the execution of the lease, ordinary wear and tear excepted. The above lease shall contain a provision that so long as there remains any unpaid balance of the purchase price the lease will not be cancelable except with the consent of Seller.*

"* * * * *

"(4) Title to the plants will be conveyed by deed or deeds of conveyance and by bill or bills of sale, effective as of July 1, 1949, and Purchaser will execute simultaneously purchase money mortgages on the real property and personal property hereby sold to secure payment of the unpaid balance of the purchase price. Each such mortgage shall secure the entire unpaid balance of the purchase price of all four plants.

(5) Delivery of the deeds, and bills of sale if required, and purchase money mortgages shall supersede and terminate the present leases of the plants between Seller and Reynolds Metals Company as of July 1, 1949, but shall in no way affect any rights or obligations of Seller or Reynolds Metals Company under said leases which had accrued as of said date.

"(6) Transfer of title shall be made subject to and including a National Security Clause mutually satisfactory to the Government and to Purchaser. Purchaser shall be given a period of one hundred and twenty (120) days or such additional time as may be mutually agreed upon by Seller and Purchaser within which to obtain approval of a National Security Clause satisfactory to Purchaser. In the event a National Security Clause satisfactory to Purchaser is not so obtained. Purchaser shall have *the option to rescind this sales agrement* [sic] as

provided in paragraph 19 hereof in which event the present leases between Seller and Reynolds Metals Company shall be revived as of the date of their termination and continue in full force and effect as if this contract had not been executed. Purchaser agrees to diligently endeavor to obtain the aforesaid National Security Clause in as short a time as possible.

"* * * * *

(8) Purchaser will obtain at its own expense and affix to the deeds transferring title to the plants and to the purchase money mortgages such Federal and state documentary stamps as may be required by law. Purchaser shall cause the deeds and purchase money mortgages to be duly recorded and will pay all recording fees and other expenses as may be required by law, state and Federal, in connection with such instruments. *Seller will make available for Purchaser's inspection and use such abstracts of title or other title papers as are in its custody covering the plants, but it is understood that Seller will not be obligated to furnish any continuation title reports or title insurance or to pay for any title expense or other charges pertaining to the transfer of the plants.*

"(9) *In the event a title examination* or examinations instituted subsequent to the acceptance of this agreement by Purchaser and prior to the delivery of the deeds (but in no event more than ninety days after receipt by Purchaser of such title evidence as Seller is able to deliver) *reveals or reveal a defect or defects in title* which the Purchaser reasonably regards as rendering the same unmarketable, *then this agreement may,* at Purchaser's option, *be rescinded and nullified by Purchaser* as provided in paragraph 19 hereof unless the Seller shall elect to cure at its expense such defect or defects and shall cure the same within sixty days after notice from Purchaser.

"* * * * *

"(11) *This sale shall expressly include,* however, *all rights, title and interest of the Seller and of the United States of America, without warranty of title, express or implied,* in and to all of the facilities, rights and assets, including contract rights, of the plants and of Plancors 226-X, 226-K, 226-O and 652. * * *

"(12) *Purchaser will be responsible for all insurance coverage, taxes, maintenance, costs and other expenses incurred in connection with the captioned properties applying to the period from and after July 1, 1949. If any of the property be damaged or destroyed by any cause after July 1, 1949 and before the full purchase price shall have been paid, such damage or destruction shall not affect this agreement but the full purchase price shall be paid irrespective thereof.*

"* * * * *

"(19) In the event that this sales agreement is *rescinded* by Purchaser in accordance with the terms hereof, or in the event that, through no fault of the Purchaser, this transaction is not consummated, the leases of the plants between Seller and Reynolds Metals Company shall be revived as of the time of their termination and shall continue in full force and effect, notwithstanding any of the terms or provisions hereof, as if this sales agreement had never been executed, in such event any portion of the purchase price or of interest thereon theretofore paid by Purchaser hereunder shall be credited against rentals which have accrued or which will accrue under the leases between Seller and Reynolds Metals Company. In no event shall Seller or Purchaser or Reynolds Metals Company be liable for any accrual of interest on such payments of principal and rent respectively.

"* * * * *

"(29) It is agreed that spare parts capitalized under Plancor 1646, materials and inventories, not capitalized under the plancors 226-X, 221-K, 226-O,

and 652 are not included in this sale and that purchaser will continue to be responsible for such spare parts, materials and inventories until such time as Seller elects to remove them from the plants at any time prior to December 31, 1950. *Purchaser shall give Seller assignable rights of ingress and egress for the purpose of such removal and shall cooperate with and assist Seller in processing the raw materials to saleable form.*

"This agreement is executed in quadruplicate. If the foregoing terms and conditions are acceptable to you, please indicate your acceptance by executing and returning to this Administration three copies of this agreement within seven days from the date hereof.

"Very truly yours,

[Sgd.] PAUL L. MATHER
Liquidator of War Assets
General Services Administration

"Accepted this 21st day of December, 1949

REYNOLDS ALUMINUM COMPANY
By [Sgd.] R. S. Reynolds Jr.
President

"To the extent that the foregoing letter of intent affects Reynolds Metals Company it is accepted this 21st day of December, 1949

"REYNOLDS METALS COMPANY

By [Sgd.] R. S. REYNOLDS JR.
President". (Italics ours.)

Under date of December 20, 1949, the General Services Administration addressed another letter to plaintiff and Reynolds Metals Company, the material portion of which reads:

"Referring to the Letter of Intent dated December 15, 1949 covering the sale to you of the Hurricane Creek Alumina Plant, the Jones Mills and

> Troutdale Reduction Plants and the McCook Sheet Mill, *it is understood and agreed between us that upon your acceptance thereof, the leases,* except as to the rights and obligations specifically reserved, *are cancelled and terminated by virtue of such acceptance as of July 1, 1949.*" (Italics ours.)

The foregoing was accepted by plaintiff and Reynolds Metals Company on December 21, 1949.

As its first assignment of error, plaintiff alleges:

> "The trial court erred in holding that the Letter of Intent was not 'significantly different' from an executory contract of sale, and that therefore it was within the rule of S.R.A. Inc. v. Minnesota, 327 U.S. 558, 66 S. Ct. 749, 90 L. Ed. 854 (1946), viz., that the federal constitution permits state taxation (subject to the government's prior lien for the unpaid balance of the purchase price) of government property which the United States is selling under a sale contract, if the contract is an executory contract of sale or its equivalent."

In support of this assignment of error, plaintiff contends that the letter of intent was merely a preliminary and conditional sale agreement, resembling an earnest money agreement, and that it was distinguishable from the conventional executory contract of sale in important and material respects. In its brief, it then states:

> "* * * the S.R.A. case's sanction for state taxation of property which the government has contracted to sell, is applicable only if the sale contract is an executory contract of sale or its equivalent, passing a present beneficial interest; * * *."

From this we understand that plaintiff will concede that if the sale contract is an executory contract

of sale or its equivalent, passing a present beneficial interest to the purchaser, then the property sold is subject to state taxation, by virtue of the decision in *S.R.A. Inc. v. Minnesota*, supra.

Counsel for both sides to this controversy have ably argued in detail the legal and factual problems involved on this appeal, not only in their well-prepared briefs, but also upon their oral arguments in this court. To comment herein upon the many points they sought to make and establish by argument and references to authorities would extend this opinion far beyond the necessities of the case. However, by not specifically mentioning herein or discussing the several points contended for or the numerous authorities cited and quoted from, we do not wish it to be understood that we did not give full consideration to all of them. For the purposes of this opinion, we feel it is necessary only to state our conclusions.

From the provisions of the contract and, in particular, from the emphasized portions thereof, supra, we conclude that the agreement between the parties was an executory contract of sale and that at least the equitable title to the property passed to plaintiff immediately upon the execution thereof: viz., December 21, 1949. The provision respecting title examination is not a mandatory provision nor a condition precedent to the passing of title. If the title proved faulty, then plaintiff was given a right to rescind, an option which it could exercise or not as it wished. A right to rescind a contract presupposes an existing, binding contract, absolutely good and enforceable until effective recission takes

place. This provision of the contract was solely for benefit of plaintiff, and undoubtedly was inserted in the contract in the light of the fact that the government was under no obligation to warrant title. In passing, we note that the title of the government proved to be good, so the occasion for exercising the right to rescind never arose. At most, the provision respecting the right to rescind for defective title was a condition subsequent, and in no way affected the legal status of the parties at the time the contract was executed.

What we have said respecting the right to rescind for defective title applies with equal force to the provision regarding a National Security Clause, paragraph (6) of the contract, supra.

In the very first paragraph of the agreement we find words speaking in the present, not *in futuro*. "Seller hereby sells" and "Purchaser hereby buys" are the terms used. Purchaser agreed to and did pay more than two million dollars upon the purchase price on December 21, 1949, part by credits on rental, part by a supply of aluminum pig, and the balance by check dated and delivered December 21, 1949. The supplemental letter of December 20, 1949, supra, referred to *"the sale"* to plaintiff of the Troutdale plant, and upon acceptance by plaintiff on December 21, 1949, specifically provided that the prior leases are presently canceled and terminated as of July 1, 1949. Considering the contract as a whole, the effect of this latter provision was to place plaintiff in possession of the property as owner and lessor and Reynolds Metals Company as lessee on December 21, 1949, although their respective obligations to

each other, and to the United States, related back to July 1, 1949. The arrangement in the contract for Reynolds Metals Company to assume the status of lessee as to plaintiff was for the protection of the United States. The contract itself provided for the execution of the deed and bills of sale (if needed), the purchase money mortgage (including the provisions of such mortgage, in detail, and conditions respecting foreclosure thereof, including a guarantee of $10,000,000 by Reynolds Metals Company for payment of deficiency judgments, if any), and other minute details for the final closing of the transaction.

Moreover, on March 3, 1950, plaintiff addressed a letter to Reynolds Metals Company, outlining the contractual relationship between itself and Reynolds Metals Company, largely as fixed by the letter of intent, and in that communication made the following significant statement:

> "By agreement with the United States * * * *Reynolds Aluminum Company became the owner as of July 1, 1949* of the four Government plants at * * * Troutdale, Oregon * * *." (Italics ours.)

This letter, in which it describes itself as *owner* of the plant as of July 1, 1949, was written by the plaintiff more than three months prior to the execution of the deed and the purchase price mortgage (and bill of sale) provided for in the contract of sale. The above statement which we have emphasized is a part of the stipulated facts in this case and obviously it is a definite admission against interest on the part of plaintiff in this litigation. *Oxley v. Linnton Plywood Association* —Or—,

284 P2d 766; *State v. Anderson,* 10 Or 448, 454; 4 Wigmore, Evidence 68, § 1069.

Another provision of the contract pointing out its true character as an executory contract of sale and purchase is the immediate assumption by plaintiff of all risk of loss of or damage to the property dating from July 1, 1949. It also is significant that the United States felt it necessary to specifically reserve in the contract a right in itself of ingress to and egress from the premises sold, a provision wholly unnecessary if it continued to be the sole owner until the deed was actually executed.

On January 1, 1950, at 1 a.m., plaintiff at the very least was the equitable owner of all the property involved in this litigation *and was in actual and exclusive possession and control of the whole thereof.* In any event, the United States retained legal title solely for its security, if, in truth, it retained it at all. Under an executory contract of sale and purchase of land the vendee is treated in all respects as the owner of the property, although he has an equitable interest only. Until the contract is fully performed and the vendee is entitled to a conveyance of the legal title, the vendor retains the legal title simply as security for performance by the vendee. *City of Reedsport v. Hubbard et ux.,* 202 Or. 370, 390, 274 P2d 248; *Harder et ux. v. City of Springfield et al.,* 192 Or 676, 686, 236 P2d 432. These rules respecting the sale of real property apply with equal force to the personal property transferred to plaintiff as an integral part of the entire transaction. *Soderstrom v. White,* 68 ND 293, 279 NW 306, 117 ALR 391, and note; 46 Am. Jur 589, Sales, § 48. In view of the

applicable law, the personal property involved in this suit was subject to taxation by defendants on January 1, 1950, and was properly assessed in the name of plaintiff. *Edward Hines Lbr. Co. v. Lane County,* 196 Or 420, 248 P2d 720; *Ken Realty Co. v. State,* 247 Ala 610, 25 So2d 675; *S.R.A., Inc. v. Minnesota,* supra; *City of New Brunswick v. U. S.,* 276 US 547, 48 S Ct 371, 72 L ed 693; § 110-312, OCLA, as amended by ch 405, Oregon Laws 1949 (ORS 308.105).

In all essential respects this case is governed by the rules announced in *Edward Hines Lumber Co. v. Lane County,* supra. There is no material distinction to be drawn between the situation prevailing in the Hines Lumber Company case and that prevailing in the instant controversy. The Hines Lumber Company decision was based upon the decision of the United States Supreme Court in *S.R.A., Inc. v. Minnesota,* supra.

We have stated that plaintiff was "at least" the equitable owner of the property on January 1, 1950. We used this qualifying term because of the contention earnestly urged upon us by defendants that on January 1, 1950, plaintiff was actually the legal owner of the property involved. We recognize that there is merit in this contention, but it is unnecessary for us to decide the question in this suit. We leave it open for decision in a case where such decision is necessary to decide the issues. Equitable title, with a right to and actual possession and control of the property, is sufficient to justify the tax in this case. However, we note that the contract itself, as well as the instruments transferring title executed June 29, 1950, provide specifically that

legal title should vest in plaintiff as of July 1, 1949. On December 21, 1949, after the down payment on the purchase price was made by plaintiff, nothing remained for it to do as a condition precedent to its right to demand a deed and bill of sale and close the transaction upon execution by it of the purchase price mortgage as provided for in the contract. No particular time was set in the contract for execution and delivery of deed and bill of sale. The right to rescind given plaintiff by the contract was for its own benefit, and was a right it might waive. Defendants maintain that regardless of the date of execution of the deed and bill of sale, legal title to the property related back to, and vested in plaintiff as of July 1, 1949, the date which fixed the respective rights and obligations of all parties to the transaction, and cite in support of that theory a number of authorities. *Gray v. Beard*, 66 Or 59, 133 P 791; *Krakow v. Wille*, 125 Wis 284, 103 NW 1121; *Nicholson v. Congdon*, 95 Minn 188, 103 NW 1034; *Greenfield v. Olson*, 143 Minn 275, 173 NW 416; *Land O'Lakes Dairy Co. v. Wadena County*, 229 Minn 263, 39 NW2d 164.

Section 110-101, OCLA, as amended by ch 440, Oregon Laws 1941, defines property subject to assessment and taxation as follows:

> "All real property within this state and *all tangible personal property* situated within this state, except as otherwise provided by law, shall be subject to assessment and taxation in equal and ratable proportion." (Italics ours.)

Section 110-312, OCLA, as amended by ch 405, Oregon Laws 1949, provided:

"Except as otherwise specifically provided, *all personal property* shall be assessed for taxation each year at its situs as of the day and hour of assessment prescribed by law; * * *." (Italics ours.)

Section 110-312, OCLA, as amended, supra, prescribed *to whom* personal property may be assessed, as follows:

"* * * Personal property may be assessed in the name of the owner *or any person having possession or control* thereof." (Italics ours.)

In the light of these statutes, it is manifest that the assessment in this case was properly made by defendants. We are in no way concerned with the enforcement of the tax lien; that is not an issue in this case. Yet it might be well to point out that ample provision is made by statute for the collection of the tax without in any manner affecting any right or lien of the United States. *Hines Lumber Co. v. Lane County,* supra, § 110-839, OCLA; § 110-828, OCLA.

The decree is affirmed.

PERRY, J., did not participate in this opinion.

APPENDIX D

Opinion of the Supreme Court of the State of California in the case entitled Parr-Richmond Industries Corporation vs. S. S. Boyd, et al., filed June 29, 1954.

Plaintiff brought two actions to recover taxes paid under protest on certain property in Richmond for the tax years 1948-1949 and 1949-1950. (Rev. & Tax. Codes §§ 5136-5143.) The case were consolidated for trial, and it was stipulated that evidence would be produced only in the first case and that the judgment therein would govern the second case. The tax assessments by the county of Contra Costa and the city of Richmond followed the same pattern, the levy in each instance resting on the premise that title to the real property was vested in plaintiff on the first Monday in March of both years. Plaintiff, on the other hand, has consistenly claimed that all it had on the respective tax dates was, as the trial court found, "a qualified and contingent possessory interest in the form of a gratuitous and revocable right to possession"; that the assessment should have been made only against such possessory right, and not as if it held the whole beneficial interest. In line with plaintiff's admitted tax liability on its possessory interest in the property, respective judgments were entered against the county and the city reflecting the offset between the taxes paid by plaintiff under the protest and the amounts assessable because of plaintiff's limited possessory right. From such judgments defendants appeal.

As grounds for reversal, defendants argue these points: (1) plaintiff's failure to seek relief from the board of equalization on the alleged improper assessments as preliminary to judicial review; (2) plaintiff's possession of equitable title in the property on the respective dates as justifying its liability for the full fee tax assessments; and (3) plaintiff's adjusted tax liability as a matter referable to the taxing authorities for determination in new assessment proceedings rather than subject to computation by the trial court in effecting an equitable offset. In the light of the record and applicable legal principles, defendants' objections are not well taken.

The property involved is known as Parcels 2 and 5 of the Richmond Shipyards, consisting of about 115 acres improved with various buildings, wharves, shipways, and other structures used as part of a government shipyard during World War II. At the end of the war this property was placed under the control of the War Assets Administration for disposal as surplus property, and that agency on August 15, 1947, listed it with other property for sale and invited bids. The invitation required the bidder to declare the purpose for which he intended to use the property and stated that title would be conveyed by quitclaim deed without warranty express or implied. It also provided that the successful bidder shall "assume responsibility for and agree to pay his share, prorated from . . . [the date of assumption of possession or the delivery of the formal instruments of conveyance], of all general and special real and personal property taxes which may have been or may be

assessed thereon." It further stipulated that a minimum of 20% of the purchase price should constitute the down payment; that the successful bidder could not make any sale or lease of the property for three years after the "date of conveyance" without the government's consent; and that the invitation and bid under it should constitute the agreement between the parties, to be succeeded only by the formal instruments of transfer.

On August 15, 1947, Parr-Richmond Terminal Corporation, an affiliate of plaintiff, submitted conditional bids for both parcels, separately stating the amounts offered for the realty and the personal property thereon. Inasmuch as the tax issue here relates wholly to the realty ownership, only the bids relating thereto need to be noted—$320,000 for Parcel 2 and $125,000 for Parcel 5. One condition was that each parcel should be treated "as a unit as to lands and buildings and personal property." Another condition (Rider D) specified: "This bid is also subject to the ability of bidder to procure a policy of title insurance in its name or in the name of its nominee . . . as of the date of the completion of this transaction, in the event of acceptance hereof, showing good and merchantable title to said property free and clear of any lien or encumbrance which would substantially affect its value." Before bidding Parr had learned from a preliminary title report that the title was not then merchantable. It was also stipulated that the three-year restriction on sale or lease of the property, as stated in the invitation to bid, supra, would have to be waived or removed (Rider A).

The bids were rejected, not because of the conditions attached thereto but solely because the prices offered were not acceptable. The government made a counter-proposal of higher amounts, and after further negotiations the parties agreed on $500,000 for both parcels. The government's approval of the original bids, amended only as to the stated price, was expressed in its letter of September 23, 1947, and Parr indicated acceptance by signing a copy of the latter.

On January 21, 1948, the government's formal acceptance was communicated to Parr in a so-called "letter of intent," stating that "under date of September 23, 1947, the War Assets Administration approved the sale to the Parr-Richmond Industrial Corporation of Parcels Nos. 2 and 5 . . . together with certain buildings, improvements, and personal property . . . in accordance with the terms and conditions of your offer of August 15, 1947, as amended . . . The quitclaim deed as prepared will convey title as of 12:01 a.m. September 23, 1947." This letter gave "consent to the Parr-Richmond Industrial Corporation and/or the Parr-Richmand Terminal Company, as the case may be, to enter upon and use the land, buildings, improvements, and personal property, the title to which is being conveyed to you as of 12:01 a.m. September 23, 1947, for its account . . ." and also "the immediate right to resell or lease, subject to the terms and conditions as specified in your offer of August 15, 1947, any or all of the land, buildings, improvements and/or personal property located on Parcels 2 and 5 without prior authorization from the War Assets Administration." The letter also provided for the escrow-

ing of the down payment: "Your company, in accepting this Letter of Intent, agrees, prior to entering into possession, to deposit with the . . . Title Company . . . the agreed upon initial payment of . . . $122,412.42 . . ." On January 30, 1948, Parr delivered a check in the stated amount to the title company, accompanied by a letter of instructions reading in part as follows: " . . . whichever corporation does take title, you are authorized to deliver to the War Assets Administration the sum of . . . $122,412.42 . . . upon their depositing with you a Quitclaim Deed duly executed by said War Assets Administration, which will vest merchantable title in favor of either Parr-Richmond Industrial Corporation or Parr-Richmond Terminal Company as such determination shall be made . . . Upon receipt of this letter and the check enclosed herewith . . . will you please acknowledge receipt of same upon the copy enclosed herewith so that we may in turn hand it to the War Assets Administration as evidence of the fact that this money has been deposited with you in the above-numbered escrows."

On January 31, 1948, Parr acknowledged and accepted the "letter of intent." During that same month Parr had taken possession of both parcels in accord with the letter's authorization, and on the first Monday in March of both 1948 and 1949 held possession thereunder. It was not until June 1, 1949, that title passed pursuant to two quitclaim deeds executed as of that date, acknowledged and delivered by "the United States of America, acting by and through the War Assets Administration," to plaintiff as grantee—one deed for each parcel. Each

deed concluded with the statement "This Quitclaim Deed, executed this 1st day of June, 1949, shall be considered effective as of the day and year first hereinabove written," which was June 1, 1949—the date the government actually conveyed title, not September 23, 1947, as recited in the "letter of intent." The title company thereupon delivered to the government two deeds of trust dated and acknowledged on June 1, 1949—one for each parcel—securing the balance of the purchase price. Thus the down payment was in escrow from January 30, 1948, to June 1, 1949—sixteen months.

As above noted, the government's invitation to bid required each bidder to specify the purposes for which he intended to use the property. The Parr bid stated that its purpose was development of the property as an industrial area, bringing in new industries by long-term leases and by sale. These declarations, plus Parr's insistence on the removal of the three-year restrictions against sales and leases, make it clear that a merchantable title was an indispensable requisite of Parr's intended purchase. To that point the trial court found that "plaintiff's bid contemplated the long-term lease or sale of part or all of said realty to industrial firms desiring to locate in the city of Richmond, and . . . that purpose could not be achieved unless and until plaintiff could obtain a merchantable title to said realty; Rider D of plaintiff's bid recited the express condition of merchantable title, and went to the essence of plaintiff's conditional bid and the conditional agreement subsequently entered into between the U.S.A. and plaintiff."

The trial court found also that under the "letter of intent" Parr agreed to purchase the property if, as and when the government could convey a good and merchantable title, and that the government agreed on its part to convey such title if, as and when it could do so; further, that during all of the year 1948 the "contemplated sale or conveyance was wholly executory, and at all of said time there were clouds, encumbrances and adverse claims upon the title to said realty which adversely affected said title to a substantial degree, and which rendered said title unmerchantable." The trial court further found that on the first Monday in March, 1948, there was uncertainty as to whether the government "would be able to convey . . .(a) good and merchantable title" and if so, when, and that on that date Parr's "only interest, right or title" to the property "was a qualified and contingent possessory interest in the form of a gratuitous and revocable right to possession, the reasonable duration of" which was found to be a "period of one year."

The trial court further found that "As of the first Monday of March, 1948, for the tax year 1948-1949, defendant county . . . assessed all of said realty against plaintiff in the same manner and with the same effect as though plaintiff were the owner in fee of said realty with full beneficial ownership and use thereof. Said realty was . . . assessed . . . (at) $229,090.00 for real estate, and $335,000.00 for improvements, together with an assessment of $25,500 for certain personal property then situated on said realty; said assessment . . . was . . . charged to plaintiff upon the assessment roll of the

county as an assessment against real estate, improvements, and personal property, and not as an assessment against plaintiff's said possessory interest. In said assessment defendant county . . . did not segregate the plaintiff's qualified and contingent possessory interest in said realty from the fee ownership of the United States, and did not assess said possessory interest to plaintiff, but instead erroneously assessed the entire fee ownership of said realty to plaintiff; a proper segregation of plaintiff's qualified and contingent possessory interest in said realty and a proper assessment of said interest . . . would have resulted in an assessed value . . . of $71,581.-00 . . ." The trial court also found and concluded that the assessments when made by both county and city were illegal and void for the reason that the United States was the owner in fee of the property taxed against Parr, and that Parr's possessory interest had not been assessed at all.

The trial court concluded that under the terms of the conditional agreement "plaintiff was not obligated to purchase said realty unless and until said condition (good and merchantable title) was met, and unless said condition was met within a reasonable time plaintiff was not obligated to purchase said realty, and the U.S.A. was not obligated to sell said realty in any event, and said conditional agreement would terminate; said conditional agreement did not effect an equitable conversion as to said realty on the first Monday in March, 1948, or at any time during the tax year 1948-1949, and at no time prior to or during said tax year was plaintiff

the legal or equitable owner of said realty by virtue of said conditional agreement or otherwise."

The trial court deducted the taxes which it found Parr should have paid on its possessory interest from the amount paid under protest and entered judgment for the difference against the respective county and city defendants. Defendants attack this judgment on both procedural and substantive grounds.

Defendants first claim that plaintiff's protest of tax assessments raises a question of valuation which should have been presented to the board of equalization before a judicial review was sought. (Rev. & Tax. Code, § 1607.) Plaintiff alleged that in July of each of the two tax years it filed "a duly verified petition for cancellation of erroneous and illegal assessments and for reduction in assessments" with the respective board of supervisors and the city council, each sitting as a board of equalization, and that the petitions were denied. Copies attached to the complaint show that the ground of plaintiff's protest was not a claim of overvaluation of an owner's property calling for "a reduction in an assessment on the local roll" (Rev. & Tax. Code, § 1607), but rather was a claim of illegality against the assessments *in toto* as based on an erroneous ownership—the fee interest in Parr, not its revocable possessory interest in the property, a separate taxable item which was not recognized and assessed at all. During the trial plaintiff stipulated that the allegations of "demand and refusal" of relief by the respective boards of equalization were "set up as a part of the background" but "are in no

way essential to plaintiff's cause of action and . . . may be stricken as surplusage."

Plaintiff is correct in its distinction as to the necessity for recourse to the board of equalization prior to resort to the court. Where the owner of property rights claims that the tax assessment overvalued what he owned, he may not attack the determination of a board of equalization in court unless he has fully and fairly presented the question of the value of his property to the board. (Los Angeles Gas & Electric Co. v. County of Los Angeles, 162 Cal. 164, 168-169; Hammond L. Co. v. County of Los Angeles, 104 Cal. App. 235, 241; Eastern-Columbia, Inc. v. County of Los Angeles, 61 Cal. App. 2d 734, 745.) But where the taxpayer attacks the assessment as void because he does not own the property on which the tax demand was made, there is no question of valuation which must be presented first to the board of equalization for correction as a condition for judicial relief. (24 Cal. Jur. § 283, p. 313; Brenner v. Los Angeles, 160 Cal. 72, 76.) As was said in Associated Oil Co. v. County of Orange, 4 Cal. App. 2d 5, at page 9: "While in one sense it is true that almost any mistake which results in an excessive assessment amounts to an overvaluation of the property of a taxpayer, we think there is a real and distinct difference between those cases in which it may properly be said that the error is one of overvaluation and those cases in which the overvaluation is a mere incidental result of an erroneous assessment of property which should not have been assessed." So here plaintiff's theory of relief— from an illegal tax because it was levied against

a greater property interets than it allegedly owned, the whole ownership interest, and not against its limited possessory interest for which plaintiff admitted liability —did not require its prior application to the board of equalization before recourse to the court. (See United States v. Allegheny County, 322 U.S. 174, 187; Cottstein v. Adams, 202 Cal. 581, 584-585; Los Angeles v. Board of Supervisors, 108 Cal. App. 655, 664-665.)

There now remains the principal issue of whether the challenged tax assessments may be supported under the doctrine of equitable conversion. Defendants contend that while the government may have held legal title to the property, plaintiff held equitable title under an executory contract of sale, an interest assessable on the basis of the full value as "real property" (Rev. & Tax. Code, § 104), rather than a mere segregable "possessory interest" (Rev. & Tax. Code, § 107). The doctrine of equitable conversion "is a mere fiction resting upon the principle that equity regards things which are directed to be done as having actually been performed where nothing has intervened which ought to prevent such a performance." (19 Am. Jur. § 2, p. 2.) An unconditional contract for the sale of land, of which specific performance would be decreed, grants the purchaser equitable title, and equity considers him the owner. (1 Tiffany on Real Property (3rd ed.), § 307, p. 528; 2 Pomeroy's Equity Jurisprudence (5th ed.), § 372, p. 33; Estate of Dwyer, 159 Cal. 664, 675.) But there is no equitable conversion where the contracting parties demonstrate an intention to the contrary. (19 Am. Jur. § 4, p. 4; Estate of Pforr, 144 Cal. 121, 128;

Estate of Gracey, 200 Cal. 482, 488-489; McCaughna v. Bilhorn, 10 Cal. App. 2d 674, 678-679.)

The trial court resolved the question of the vesting of equitable title by holding that "at no time prior to or during said tax year was plaintiff the legal or equitable owner . . ." The record clearly supports that conclusion: (a) Parr knew before it bid that a variety of matters—including uncompleted proceedings in eminent domain—rendered the title unmerchantable; (b) the government accepted the conditional bid which called for a merchantable title; (c) the escrow provisions in the "letter of intent" were tacit admissions by the government that it needed time to make the title good; and (d) the sixteen-month delay before execution of the quitclaim deeds accentuated the time consideration required for the removal of all clouds and encumbrances on the title. Defendants argue that the government's letter of September 23, 1947, which was accepted by Parr in conclusion of the parties' negotiations as to the price to be paid for the property, constituted their contract. That letter made no reference to Parr's offer and its conditions as to merchantable title. However, it was followed by the government's formal acceptance in the "letter of intent," and the trial court properly concluded that this latter document, later in point of time—January 21, 1948—and incorporating the government's invitation for bids along with the terms of Parr's conditional bids, constituted the conditional agreement between the parties. The "letter of intent" contained the escrow provisions above quoted, which thereby became part of the

parties' contract. Any doubt as to the parties' intentions was settled by the recital in both quitclaim deeds that they become effective as of their date, which was June 1, 1949. As so executed, the deeds themselves superseded and nullified the provisions in the earlier writing to the effect that title would be conveyed "as of 12:01 a.m. September 23, 1947," and made it clear that title vested on June 1, 1949, and not before.

Defendants rely on S.R.A., Inc. v. Minnesota, 327 U.S. 558, but the facts found by the trial court and above discussed clearly distinguish the present situation. The two cases have one point in common in that the property in both instances was surplus real estate, the legal title to which was vested in the United States. However, there are several points of difference which are material: (1) In the S.R.A. case the contract was the normal vendor-vendee contract, where the government retained legal title only as security for the balance of the purchase and "in substance (was) in the position of a mortgagee." (P. 565.) Here the vendor-vendee contract, as modified in writing by the escrow instructions, provided for the transfer of title only if and when the government could convey a merchantable title, pending which uncertain event the down payment itself was held in escrow. The government was retaining title not for security but during the time allowed for its agreed performance, and then appropriate deeds were to be executed and notes, secured by deeds of trust, were to be and were given for the balance of the purchase price. (2) Here the whole transaction centered on acquisition

of a merchantable title, a matter not at all involved in the S.R.A. case, where "(a)ll obligations due under the contract had been met." (P. 560.) (3) in the S.R.A. case the buyer was "in possession . . . under a contract of sale with uncompleted conditions for execution and delivery of the muniments of title" when the purchase price was paid in full (p. 561), while here the buyer occupied the property under what the trial court found to be "a gratuitous and revocable right to possession" granted by the "letter of intent," an arrangement covering the interval for clearing a good and merchantable title, at which time the muniments of title were to be delivered out of escrow and deeds of trust given back. (4) During that interval Parr did not occupy the status of a normal vendee as in the S.R.A. case, where the vendee had made the down payment and nothing remained to be done by the parties except payment of the balance of the purchase price and execution of the formal conveyance. Here the fact that Parr was not in the position of the conventional vendee during the sixteen-month escrow period but was waiting to see if it was to get *any* title, alone serves to distinguish this case from the ordinary vendor-vendee situation where, as plaintiff agrees, the vendee holding equitable title is taxable as if vested with full legal title. Accordingly, in the S.R.A. case the state of Minnesota had the power to tax the property within its borders, though the legal title remained in the United States but simply for security purposes under the unconditional contract between the parties.

As between the vendor and vendee, real estate is ordinarily taxable to the vendor where the sale is con-

ditional. (2 Cooley on Taxation (4th ed.), § 603, p. 1274.) The fact that the contract of sale may have specifically provided that the purchaser should pay the taxes is immaterial; the vendor remains liable where the sale is not absolute, for property must be assessed to the owner. (Robertson v. Puffer Mfg. Co. (Miss.), 73 So. 804, 805.) For the doctrine of equitable conversion to apply in measure of tax liability, there must be "a contract for the sale and purchase of the land which is specifically enforceable at the time the rights of the parties are fixed." (McClintock on Equity, § 102, p. 182; see, also, Estate of Dwyer, supra, 159 Cal. 664, 675.) Thus, "(i)f the vendor did not have at that time the title which he contracted to convey, there is no conversion." (McClintock on Equity, § 106, pp. 182-183; see, also, Amundson v. Severson, (S. Dak.) 170 N.W. 633, 634.) Here the contract bound Parr to purchase the property if the government within a reasonable time conveyed a merchantable title. At the time of the contract's execution the government did not have such a title. It was bound, however, to exercise reasonable diligence in clearing the title. But not then having that which it contracted to convey, the government had no rights to specific performance at that time. Therefore there was no equitable conversion to support the tax assessments against plaintiff, and its protest therefore must be sustained.

Defendants finally contend that the trial court erred in itself determining plaintiff's tax liability rather than remanding the matter to the tax authorities for appro-

priate assessment proceedings. Plaintiff has conceded throughout this litigation that its possessory interest was taxable (Rev. & Tax. Code, § 107), and therefore that it would be "inequitable" for it "to seek to recover taxes which in equity it should pay." In such cases the rule applies that recovery should be limited to the difference between the tax paid and that which properly should have been paid (DeFremery v. Austin, 53 Cal. 380, 382-383), and that rule was followed here.

In determining the tax on plaintiff's possessory interest the trial court followed the formula similarly used in Kaiser v. Reid, 30 Cal. 2d 610, which was a valuation method theretofore judicially approved in cases presenting analogous considerations affecting possessory rights. (Blinn Lumber Co. v. County of Los Angeles, 216 Cal. 474, 478-479; Hammond Lumber Co. v. County of Los Angeles, supra, 104 Cal. App. 235, 244-245.) The tax as so computed was then deducted from the amount of tax claimed by defendants, and the judgments herein were entered for the difference. In the trial court defendants made no objection to the mathematical accuracy of the computation of the formula's application if Parr had only a possessory interest in the property, but they adhered to the correctness of the challenged tax assessments based on plaintiff's equitable title to the property for the respective tax years. The trial court had authority here to so proceed in affecting an equitable adjustment on the tax assessments and to enter judgments accordingly. (Rev. & Tax. Code, § 5141.) Under these circumstances, defendants are in no position now to challenge the correctness of the trial court's find-

ing of what was actually due from plaintiff based on the approved valuation formula for possessory interests.

The judgments are affirmed.

SPENCE, J.

WE CONCUR:
SHENK, J.
EDMONDS, J.
TRAYNOR, J.
SCHAUER, J.
PEEK, J. PRO. TEM.

(Carter, J., dissented upon a ground not material here.)

APPENDIX E

The decree and judgment order of the Circuit Court of the State of Oregon for the County of Multnomah (R. 7), which was made and entered in this case on April 27, 1954, was as follows:

This cause having duly come on for trial on the 11th and 12th days of January, 1954, before the undersigned, Judge of this Court, sitting without a jury, plaintiff appearing by Allan Hart, of Pendergrass, Spackman and Bullivant, and defendants appearing by George D. Leonard on behalf of John B. McCourt, District Attorney, and the cause having been duly tried upon the pleadings and stipulations of the parties without the introduction of any evidence, oral arguments and written memorandum briefs having been submitted by the parties, and the Court having made a memorandum opinion on March 15, 1954, and having heard further oral arguments on the 15th day of April, 1954, and having been fully advised in the premises, and having this day made Findings of Fact and Conclusions of Law in this cause;

Now, therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) Plaintiff's complaint be dismissed.

(2) The temporary injunction entered herein restraining the defendants from enforcing the 1950-1951 personal property tax on the Troutdale machinery and equipment be dissolved.

(3) The tax assessed to plaintiff for the 1950-1951 personal property taxes on the machinery and equipment used in the manufacture of raw or partially manu-

factured products at the Troutdale plant is a valid tax and said property is not immune or exempt from said tax.

(4) The machinery and equipment in the Troutdale plant assessed to plaintiff on the 1950-1951 Multnomah County tax roll is liable for taxes for that tax year in the amount of $199,144.00 together with interest as provided by law.

Dated this 27 day of April, 1954.

Lowell Mundorff
Judge

The decree of the Supreme Court of Oregon (R. 103), which was made and entered in this case on September 21, 1955, was as follows:

This cause on June 29, 1955, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration; and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT IS THEREFORE CONSIDERED, ORDERED AND DECREED that the decree of the court below in this cause rendered and entered be and the same is in all things affirmed and adopted as the decree of this court in this cause.

The appellant having given an undertaking on appeal with the Federal Insurance Company as its surety, conditioned that appellant will pay all damages, costs and

disbursements awarded against it on appeal; IT IS THEREFORE ORDERED that respondents have and recover of and from appellant and its said surety their costs and disbursements in this court taxed at $.....

IT IS FURTHER ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter a decree in accordance herewith.

On October 12, 1955, the Supreme Court of Oregon made and entered the following order (R. 113), denying petitioner's petition for rehearing:

The court having duly considered appellant's petition for rehearing in the above-entitled cause, and now being fully advised in the matter, IT IS HEREBY ORDERED that said petition be denied.

The court having also considered the motion of Reynolds Metals Company setting forth that Reynolds Aluminum Company, the plaintiff-appellant in the above-entitled case, has been merged into said Reynolds Metals Company, and showing that Reynolds Metals Company is now the real party in interest in said case,

IT IS HEREBY ORDERED that Reynolds Metals Company be, and it is hereby substituted for Reynolds Aluminum Company as the plaintiff-appellant in said case.